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95-1592

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL COUSIN,

Petitioner,

vs.

OFFICE OF THRIFT SUPERVISION, DEPARTMENT OF TREASURY, JOHN F. DOWNEY, DEPUTY DIRECTOR AND ACTING DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION, and ANGELO A. VIGNA, NORTHEAST REGIONAL DIRECTOR OF THE OFFICE OF THRIFT SUPERVISION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether due process of law is denied and government supervision of financial institutions imperiled by the arbitrary exercise of absolute discretion by the Acting Director of the Office of Thrift Supervision, who is vested with combined investigative, prosecutorial and adjudicative power, in ordering the removal and industry-wide prohibition of a banking officer when in so doing:

a) the acting Director without further hearing reversed all of the recommended fact findings in favor of the official made by the Administrative law Judge who heard witnesses at an evidentiary hearing, and the Court of Appeals expressly approved the reversals as an exercise of "absolute discretion" without subjecting them to heightened scrutiny.

b) the Acting Director made arbitrary rulings of law and condoned arbitrary and illegal actions by his agency and Internal Revenue agents in excess of their statutory and constitutional authority and in disregard and violation of the rights of the banking officer who was the subject of their investigative and prosecutorial excesses, including his right to compulsory process and cross examination to present his defenses.

c) the Acting Director interpreted the disciplinary powers of banking agencies to authorize punishment of banking officers for conduct unrelated to banking including alleged crimes unrelated to banking where there was no conviction or pending criminal charge.

d) the Acting Director ignored disqualifying conflicts of interest and acts of bias by agency personnel who testified and otherwise played key roles in the OTS proceedings.

2. Whether a federal district court in dismissing an indictment against a banking official, leaving no charges pending against the official, has subject matter jurisdiction and legal authority to continue indefinitely without any time limit and thereby modifying an administrative agency's suspension of

the banking official that was based solely on the agency's statutory authority to suspend banking officials who are charged with a felony.

3. Whether a banking official's failure to object to the inclusion of language in an order dismissing an indictment against him which included language that the dismissal was not a final disposition of the indictment for purposes of a statute that provides "the suspension shall remain in effect until such... such indictment is finally disposed of" was a waiver of the banking official's right to due process of law, subjecting him to a continuation of the suspension indefinitely without any charges against him having been asserted or proven by the agency, despite the lack of statutory authority for such a suspension and despite the court's lack of subject matter jurisdiction to incorporate such language in an order.

4. Whether when an administrative proceeding against a banking official results in an order of removal and prohibition barring him from participation in banking, the order moots a court case challenging the legality of the agency's wrongful continuation of his suspension for nearly 2 1/2 years prior to the order in violation of the official's right to due process of law.

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Opinions in the Case

The opinion of the Court of Appeals dismissing petitioner's appeal and denying his petition for review is reported at 73 F.3d 1242 (2d Cir. 1996), A1. The decision and order of the Acting Director of the Office of Thrift Supervision, dated October 11, 1994, and the recommended decision of removal and prohibition of the Administrative Law Judge, dated March 31, 1994, are set forth in the Appendix at A24 and A72. The opinion of the District Court in petitioner's declaratory judgment action is reported at 840 F.Supp. 8 (EDNY 1993), A107.

Basis for Jurisdiction

The judgments sought to be reviewed were rendered and filed on January 3, 1996. 28 U.S.C. §1254(1), to which reference is made in 12 U.S.C. §1818(h)(2), is the statutory provision which confers jurisdiction on this Court to review the judgments in question on a writ of certiorari.

Constitutional Provisions and Statutes Involved

This case involves the provision of the Fifth Amendment to United States Constitution that "No person shall... be deprived of life, liberty or property without due process of law...."

12 U.S.C. §1818(g) provides in pertinent part:

> **(g) Suspension or removal of institution – affiliated party charged with felony**
>
> 1) Whenever any institution-affiliated party, is charged in any information, indictment, or complaint, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a terms exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or

> participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution.... Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or terminated by the agency....

12 U.S.C. §1464(d)(4)(A) (1982), provides in applicable part that OTS may bar an officer from future participation in the affairs of a federally insured banking institution if it finds that the officer has:

> [1] committed any violation of law, rule, or regulation..., or
>
> has engaged or participated in any unsafe or unsound practice in connection with the association, or
>
> has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and
>
> [2] the Board determines that the association has suffered or will probably suffer substantial financial loss or other damage [,] or
>
> that the interests of its savings accounts holders could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, or
>
> that the director or officer has received financial gain by reason of such violation or practice or breach of fiduciary duty, and
>
> [3] that such violation or practice or breach of

fiduciary duty is one involving personal dishonesty on the part of such director or officer, or

a willful or continuing disregard for the safety or soundness of the association.

12 U.S.C. §1464(d)(4)(A) (1982)(emphasis and format added, A8).

12 U.S.C. §1818(f) provides:

(f) Stay of suspension and/or prohibition of institution -- affiliated party

Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

12 U.S.C. Sec. 1818(i) provides:

(i) Jurisdiction and enforcement; civil money penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section or under section 1831o or 1831p-1 of this title, and such courts shall

> have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 1831o or 1831p-1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

Statement of the Cases

Petitioner, Michael Cousin, seeks review of an opinion of the Court of Appeals, 73 F.3d 1242 (2d Cir. 1996), A1, dismissing as moot his appeal from the dismissal of a declaratory judgment action challenging his indefinite suspension by the Office of Thrift Supervision ("OTS") as unauthorized by law and violative of his rights to due process of law, Docket No. 94-6070, "Record I," and denying his petition for review of a subsequent decision and order of the Acting Director of OTS directing his removal as a banking officer of Cross County Federal Savings Bank, Queens, New York and prohibiting him from further participation in banking. Docket No. 94-4206, "Record II." A24.[1]

This case has its genesis in a grand jury subpoena IRS served in late 1986 upon European American Bank for records of petitioner. It is undisputed that petitioner was not a target of the grand jury which was investigating major organized crime in New York City. The sole purpose of the initial subpoena and a subpoena later served by IRS upon a real estate agency, All Queens Tudor Realty (AQTR), to which Mr. Cousin had personal ties, was to enable the IRS agent to establish a close relationship with Mr. Cousin in an effort to use him as a source of information and an informer in the organized crime investigation. See, e.g. RIIA1229. The agent

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[1] References beginning with "A" are to pages of the appendix to this petition. References beginning with "RIA" and "RIIA" are to pages of the appendices in Record I and Record II respectively.

caused subpoenas to be issued, RIIA1229, and followed up with the review of documents to create the appearance of IRS harassment of petitioner knowing of his poor health and heart condition, RIIA1218, RIIA1258, RIIA1264, and the hospitalization of the principal officer at All Queens Tudor Realty and her mother. RIIA1231. This created an opportunity to ingratiate himself to petitioner and caused petitioner to be grateful and to continue discussing prominent persons who were subjects of the major investigation the agent was working on.

At the time this subpoena was served petitioner was at the pinnacle of a distinguished, highly successful career as a banker. As chief executive officer he had guided Cross County Federal Savings Bank through decades of successful operation and growth. Unlike many of the banking institutions subject to regulation by OTS and other state and federal agencies, the Bank's operation had at all times been exemplary and presented no regulatory concerns. As one of the OTS's witnesses conceded, not a breath of corruption or scandal had attached to the Bank's operations during Mr. Cousin's tenure. RIIA1270.

The Bank was a major force in the economic growth of its community. Its conservative banking practices and no frills low cost operation protected depositors and customers in a very difficult period for the savings and loan industry. The Bank was Mr. Cousin's life. RIIA1281-82. His compensation was modest. He worked tirelessly for the benefit of the Bank and its depositors. The Bank played a civic as well as financial role in supporting its community. Mr. Cousin was a civic as well as a business leader in the community. RIIA1342-44.

Petitioner knew there was no basis for the subpoenas and investigations. He therefore honestly believed they should be terminated. He felt befriended by and was grateful to the agent for as it seemed to him protecting him from IRS harassment. The subpoenas, which could have been quashed had their true nature been disclosed, were complied with, records were turned over and the IRS agent obtained the

intended contact with Mr. Cousin resulting in hundreds of taped meetings and phone calls over a period of 3 1/2 years in which the IRS agent pressed for information about organized crime targets and to persuade Mr. Cousin to be an informer.

Mr. Cousin discussed organized crime targets repeatedly with the agent, but refused to become an informer. As a result, petitioner was indicted in September 1990 on six counts for alleged bribery of an IRS agent and two counts charging conspiracy, or aiding and abetting in connection with bribery of the same agent, over three years after the first and nearly two years after the last alleged bribe. OTS in September 1993 added to the bribe claim a claim of illegal gratuity, A959.

All parties to these multiple proceedings, IRS, OTS and the U.S. Attorney concede that Mr. Cousin never sought or received money, or other financial gain from any of his alleged wrongdoing.

On learning of the criminal charges in August 1990, OTS reacted severely and abruptly. It suspended Mr. Cousin on the basis of the indictment, without having knowledge of the facts, any opportunity to weigh them, or any apparent concern for their banking relevance.

Mr. Cousin filed a petition with OTS for a hearing to terminate the temporary suspension, and following the hearing, held before an OTS employee, the Director of OTS, on July 12, 1991, adopted a recommended decision of the employee and ordered continuation of petitioner's suspension and prohibition "until the final disposition of the indictment upon which the Notice is based." RIA-82.

On May 6, 1992 appellant moved orally to dismiss the indictment on the grounds that he was not physically competent to stand trial. The motion was granted. A114. Thereafter by letter dated May 15, 1992 the Regional Director of OTS, acknowledging that OTS was not a party to the criminal case, and stating that OTS had received information that appellant intended to seek reinstatement as Chairman and

CEO of the Bank, requested the Court to "condition the entry of dismissal on Mr. Cousin's consent to a final Order of Prohibition or, in the alternative, to insert specified language in the Order with respect to the dismissal. RIA84.

Petitioner received a copy of the OTS letter and wrote to his counsel directing him not to consent to a final Order of Prohibition. RIA145.

Counsel for petitioner wrote the District Judge setting forth similar language to which he had no objection and on May 25, 1992, the Court issued an order of dismissal containing that language in the final sentence: "This dismissal does not constitute a final disposition of the indictment for purposes of 12 U.S.C. §1818(g), is not a dismissal on the merits, and is a dismissal based solely upon the physical condition of the defendant MICHAEL COUSIN." A115.

Two months later, the Regional Director wrote the Bank's Board members that the OTS Order of Suspension was still in effect, concluding "Cousin is prohibited from participation, directly or indirectly, in any manner in the conduct of the affairs of any insured depository institution." RIA88.

Petitioner represented by new counsel wrote the Director of OTS seeking his acknowledgment that his Order of July 12, 1991 was no longer in effect because once the indictment was in fact dismissed it could provide no basis for further suspension, and that to claim the suspension survived the dismissal of the indictment would leave appellant in a "remediless limbo" damaging important liberty and property interests without due process of law, citing Federal Deposit Insurance Corporation v. Mallen, 480 U.S. 230 (1988).

Further correspondence ensued which did not resolve the matter. On February 5, 1993, petitioner filed a declaratory judgment action seeking a determination that he was not under any suspension.

Three months later, on May 13, 1993, and nearly a year

after dismissal of the indictment against appellant, OTS filed a Notice of Intention to Remove and Prohibit appellant from his offices and all participation in activities of the Bank under 12 U.S.C. §1818(e) containing two counts. RIA100. It did not seek suspension pending a decision on the merits, as it was authorized to do under 12 U.S.C. §1818(e)(3), and which would have been subject to immediate judicial review under §1818(f), relying instead on its contention that its earlier order remained in force, thus denying petitioner immediate judicial review of the suspension under §1818(f). Count I was based entirely on the two largest of the six alleged bribes in the indictment in 1987 and 1988, the others alleging two cash payments of several hundred dollars at Christmas in 1988 and 1989 and on two other occasions items of minimal value of a type distributed as gifts in banking. Count II was based on two counts of criminal conspiracy and aiding and abetting the bribery of the IRS agent by John Parlante who petitioner had told the agent he believed was evading income taxes. See, RIA100.

Petitioner answered the OTS notice, denying the charges and raising several affirmative defenses, alleging, among other things, that the charges were too remote in time and barred by laches,that they were unrelated to banking and had no adverse effect on the bank or its depositors or shareholders, that they resulted from outrageous government misconduct and entrapment and were part of a continuing course of harassment and intimidation of petitioner, the Bank and its directors.

In June 1993, OTS moved to dismiss petitioner's declaratory judgment action for failure to state a claim. Petitioner cross-moved for summary judgment.

In September 1993, the OTS removal and prohibition proceeding came on for hearing and was tried by an Administrative Law Judge on September 13-15, 1993. Petitioner on doctor's orders did not attend. The ALJ received evidence on each of the Counts charged in the OTS notice, principally the elements of the several crimes charged, and observed and questioned witnesses. Post hearing

submissions were filed by both sides.

In January 1994, the District Court granted OTS's motion to dismiss petitioner's declaratory judgment action, A107, holding that petitioner had waived his right to have his suspension terminate with the dismissal of the indictment. The Court rejected petitioner's claims that there was no statutory authority for continuation of the suspension, and that the Court lacked subject matter jurisdiction to extend the suspension by its order. Petitioner appealed.

On March 31, 1994, the ALJ issued his recommended decision. A72.

As to Count I charging bribery of an IRS agent in 1987 and 1988, the ALJ recommended in petitioner's favor, determining that OTS failed to prove (1) any violation of law in 1987, (2) that there was any actual or potential substantial loss to the Cross County Savings or that the interests of depositors could be seriously prejudiced by any of the alleged acts, (3) that petitioner's acts were not directed toward Cross County Savings, and (4) he did not act with wilful, or continuing disregard for the safety, or soundness of the Bank.

As to Count II, charging aiding and abetting bribery, the ALJ found as summarized by the Acting Director of OTS ("AD") that petitioner violated 18 U.S.C. §2 by aiding and abetting, that his conduct, the disclosure of confidential bank information, constituted an unsafe and unsound banking practice and was a breach of fiduciary duty to Cross County and recommended removal. The recommended decision depended entirely on alleged misuse of confidential banking information and the ALJ's conclusion that the Bank will probably suffer substantial financial loss or other damage. A31.

Both parties filed exceptions and other post-decision submissions with respect to the ALJ's recommended decision, and the record was sent to the AD for decision.

Oral argument on petitioner's appeal from the dismissal of his declaratory judgment action was heard on September 14,

1994, before a panel consisting of Circuit Judges Altimari, Lumbard and Oakes. The panel reserved decision.

On October 11, 1994, the AD issued his decision which overruled nearly all of the findings of fact and numerous legal rulings of the Administrative Law Judge (ALJ) who heard the evidence, and decided all issues against petitioner.

Noting that "The Acting Director generally accepts facts relied on by the ALJ," A32, the AD rejected nearly all of the ALJ's fact findings on Count I, most of his fact findings on Count II and many of his legal rulings on both counts.

The AD denied appellant's motion for oral argument and decided the matter on the record and extensive written submissions to his Office by the parties. He ordered "Cousin is removed from office and prohibited from further participation in any manner, in the conduct of the affairs of Cross County" or any other institution. A70.

The alleged bribes totalled less than $10,000 in value and were unrelated to the operation of Cross County. No motive for Mr. Cousin's alleged conduct has even been ventured by OTS, except as to OTS Count I charges where the claim is he sought to pay for the termination of two subpoenas.

The only possible rational explanation for the Count II acts that lead to the indictment and guilty plea of John Parlante is that the IRS wanted to create bribery cases through Mr. Cousin and implicate him for aiding and abetting. Mr. Cousin insisted on assurances and received them that Mr. Parlante was illegally avoiding taxes. He never sought any money, or benefited from his acts. He never turned over any documents without a subpoena and never provided meaningful information beyond names. If he became actively involved in a plan to see whether Mr. Parlante would pay a bribe to avoid tax prosecution, it was apparently because of his antipathy toward tax evaders which he spoke of passionately in conversations with an IRS agent recorded without his knowledge.

On October 28, 1994, OTS moved following the AD's decision, to dismiss petitioner's declaratory judgment appeal as moot. Petitioner opposed the motion.

On November 6, 1994, petitioner filed a petition for review in the Court of Appeals of the AD's decision.

By order filed on December 30, 1994, the panel that had heard oral argument denied without prejudice OTS's motion to dismiss the declaratory judgment appeal as moot and referred the appeal to the panel assigned the petition to review the OTS order of October 11, 1994.

Oral argument of the case was heard on June 23, 1995, before Circuit Judges Kearse, Altimari and Parker. On January 3, 1996, the Court rendered its decision denying the petition for review and dismissing the declaratory judgment as moot. A1.

This petition follows.

Reasons for Granting the Writ

I. The Arbitrary Exercise Of Absolute Discretion By The Director Of The Office Of Thrift Supervision In The Regulation Of The Savings And Loan Industry Is A Danger To The Financial Institutions Of The Nation, The Economy, The Functions Of Other Regulatory Agencies And Violates The Due Process Clause.

Courts have honed principles of due process in judicial proceedings for centuries to assure not only fairness and substantial justice for litigants confronted by the power of the State and in their private disputes, but to assure the integrity and the faithful and effective performance of government and the judiciary itself. The need for due process arises because the rule of law is not self executing and can be effectuated only by procedures that ensure its fair, impartial, efficient and equal application.

In recent decades as the numbers of everything has increased and the complexity of society has compounded, new administrative agencies designed to protect various public interests have been accorded arbitrary powers in the names of expertise, effective action and practical necessity. It was always recognized that discretion in government agents involved a degree of lawlessness proportionate to the degree of discretion. Nearly half a century ago Justice William O. Douglas warned of the dangers of excessive discretion in government agents.

> Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions.

U. S. v. Wunderlich, 342 U.S. 98, 102, 96 L.Ed. 113, 72 S.Ct. 154 (1951).

In the most extreme delegation of discretion yet, arising from the savings and loan crisis which cost Americans billions of dollars, Congress vested arbitrary power, seeming absolute discretion and authority to impose ruinous fines and penalties in the Director of OTS.

This political reaction to an emergency arises from the too prevalent instinct that arbitrary decision making and draconian force will save a situation, failing to remember the price humanity has paid for such reflexes. How well such arbitrary power served the public and the S&L industry is indicated by the tragedy which befell both on the OTS's watch.

The industry OTS regulates became so wracked by corruption and failure that the prominent bi-partisan National Commission created by Congress in 1990 to examine the industry and its regulation has called for abolition of vitally

needed thrift banks. The Commission "placed responsibility for the disaster on a failed system of federal regulation rather than on the misdeeds of a few famous criminals."

The recent experience of the U.S. Courts of Appeals which have reviewed OTS actions in the narrow area of removal of bank officials and set aside as ill considered and excessively harsh OTS orders prohibiting bank officials from participation in the industry confirms the Commission's assessment. See Kim v. OTS, 40 F.3d 1050 (9th Cir. 1994)("defendant's conduct does not justify the imposition of such a draconian measure as a permanent Prohibition Order"); Seidman v. OTS, 37 F.3d 811, 924 (3d Cir. 1994) granting Seidman's petition for review and vacating an order for his removal and prohibition and stating with respect to scope of review "deference is not appropriate when "bizarre" interpretations of a statute are made out of regulatory zeal," citing Wachtel and other cases; see also Wachtel v. OTS, 982 F.2d 581, 582 (D.C.Cir. 1993)("We reject OTS'S rather bizarre construction of the statute.").

The principal cause for this costly failed system of federal regulation is the arbitrary power and unbridled discretion administrators believe they possess and exercise. A strong dose of constitutional limitations and due process requirements is the best medicine that can be prescribed for OTS, any successor agency that may replace it and other existing agencies with similar powers. A better case than this in which to analyze the dangerous effects of excessive power and discretion will not be found.

The rights involved are protected by the Due Process Clause.

> It is undisputed that appellee's interests in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause. Federal Deposit Ins. Corp. v. Mallen, 480 U.S. 230 at (1988).

The Court of Appeals has approved the conduct of the OTS proceedings in the most sweeping and uncritical terms:

> The administrative process by which Cousin was disciplined was mandated by statute and entirely constitutional. While the AD had authority over the investigative, prosecutorial and adjucative functions performed by his agency, and while he also had absolute discretion to accept or reject the ALJ's recommended findings of fact and rulings of law when arriving at his Final Order, such combined functions and adjudicatory discretion fall well within the mandates of the Fifth Amendment. A16.

By acknowledging that the Acting Director of OTS has "absolute discretion" to accept or reject the ALJ's recommended findings of fact without acknowledging and exercising the judicial duty of careful review, the Court below has destroyed the utility of administrative law judges and any constitutional protection and fact finding benefit their efforts might offer. No reviewing court would ever claim to have absolute discretion to reject the findings of fact by a trial court nor could due process and sound fact determination be assured where courts did.

In this case the Acting Director denied petitioner any oral argument, rejected nearly every finding of fact by the ALJ, reversed some of his rulings of law and adopted different legal analyses to make its controlling decisions.

A. The AD Arbitrarily Exercised Absolute Discretion To Reverse Fact Findings Of The ALJ

OTS enforcement chose without precedent to proceed against Mr. Cousin with a formal charge in the form of a criminal indictment framed in two counts. Count I relied entirely on alleged violations of federal criminal statutes, while Count II relied on both an alleged crime and banking violations.

The ALJ, a professionally trained hearing officer with no other duties, found against the OTS on each of the three

elements in Count I and was arbitrarily reversed on all three elements by the AD, an acting agency head with no legal training and a bureaucracy to protect. The ALJ found against appellant in all three elements in Count II. The AD declined to adopt the AlJ findings on the second and third elements. He made a finding as to the effect of the alleged conduct that it could cause serious prejudice to bank depositors. He found that personal dishonesty can be a basis for removal and need not relate to the Bank, contrary to the ALJ.

Among others, the Acting Director rejected the Administrative Law Judge's fact findings that

l) there was no bribe in 1987, A44;

2) there was no illegal gratuity, A48-49, a holding that was both inconsistent with his reversal of the ALJ's conclusion there was no bribe, since the same act could not be both a bribe and a gratuity, and unnecessary, demonstrating the AD's determination to support his own enforcement personnel in all things;

3) there was no harmful effect resulting from Mr. Cousin's acts, A53, A57;

4) the personal dishonesty alleged was not related to banking, therefore it could not violate the statute, A60 (Count I), A57 (Count II);

5) there was no possibility of serious prejudice to depositors, A60, A66, Count I and Count II, by implication since the ALJ did not make a repetitious finding. The AD's finding that the conduct could prejudice depositors became the one finding his final decision turns on.

The AD's rejections of the ALJ's findings were arbitrary and are unsupported in the evidence and demonstrate his determination to support OTS enforcement in the proceedings.

Among the AD's arbitrary rejections of the ALJ's

findings are the following:

1) The AD's arbitrary approach is powerfully exposed by his strained disposition of a supervising IRS agent's testimony that he doubted that bribery had occurred in 1987. Stating that the ALJ appeared to rely "largely on the weight he gave to the testimony of" Supervising Agent Fanelli, the AD first complains the ALJ should not have relied on Fanelli's "legal conclusions." A46. Agent Fanelli faced with the facts in the case and the more than three year IRS delay in seeking an indictment, expressed his opinion that it was "iffy" whether a bribe had occurred. The AD then states "...since Fanelli was discussing the possibility of criminal prosecution, ALJ wrongfully applied the standard of proof required by a criminal proceeding -- beyond a reasonable doubt -- to a civil administrative action, which only requires a preponderance of the evidence." A46. The ALJ did not say he required proof beyond reasonable doubt. The test for the possibility of criminal prosecution would have been probable cause, a standard lower than preponderance of the evidence, but "iffy" evidence would fail all these standards. The AD then added that agent Fanelli's testimony "is wholly irrelevant because Respondent was in fact ultimately charged and indicted by a grand jury," apparently believing the indictment is dispositive of the question of guilt. A47. Not willing to rest on these grounds, the AD added, "Furthermore, Fanelli's opinion is not direct evidence of what transpired." Id. He apparently believes that only a person who witnessed an act, and not an experienced supervising investigator who in a very expensive surveillance overheard simultaneous radio transmissions and always reviewed the evidence later, can form an opinion of the legality of acts that is worthy of weight. Having acknowledged that the ALJ relied on other evidence which was abundant in the record to support his finding, the AD states "the Recommended Decision does not identify such evidence," id., without addressing the abundant evidence supporting the ALJ decision.

2) The AD ruled the claims of outrageous government misconduct were "baseless," A52, without noting extensive record evidence to the contrary and the denial of discovery and

cross examination to prove it. He ruled "the record does not reflect that Respondent lacked predisposition," id., apparently placing the burden on Mr. Cousin to prove an absence of predisposition and that OTS denied Mr. Cousin the power of a subpoena and right to cross examine to prove government misconduct and entrapment. He found Mr. Cousin was not "induced" by the agent to make gifts to him despite the agent's own admissions and OTS's denial of discovery. RIA1207, 1216.

3) While arbitrarily reversing the ALJ's finding that Assistant Regional Director Simone's testimony was insufficient to show potential substantial harm to Cross County Savings, the AD fails to address Mr. Simone's egregious conflict of interest under OTS regulations. See, 12 CFR 509.3(c) and 509.40(c). He ignores Simone's direct supervisory responsibility over Cross County, that he first alerted Enforcement of the newspaper report of Mr. Cousins' arrest and that he reviewed the initial Notice which commenced the proceedings. The AD then finds U.S. v. Sette, 334 F.2d 267 (2nd Cir. 1964) "inapposite, as Sette involved expert testimony by the same agents who conducted the investigation; was rendered prior to the adoption of the Federal Rules of Evidence, and did not involve adjudicatory proceedings such as this." fn. 21 at A55. The AD notes "OTS officials, such as Simone, possess the requisite expertise... to make such predictive judgments." But he ignores Simone's testimony, years after the events and the filing of the complaint, alleging that injury "could" result, and that Simone but he could point to no actual injury. See, A55, RIIA1373-74.

4) The lengths to which the AD went to arbitrarily reverse the ALJ and support OTS Enforcement is revealed by his drawing "an adverse inference from Respondent's failure to testify on his own behalf," n. 10 at A45. Mr. Cousin did not testify on doctors orders. But the AD ignores the many places in the hearing and court proceedings where respondent's dangerously poor health is mentioned from the very first secret taping of his conversations by the IRS agent in 1987, to the dismissal of the indictment on grounds of health in 1992. See, e.g, RIIA497, 500, 515, 522, 542, 583, 590, 605, 610, 614, 615, 624, 649. He ignores the evidence in the OTS hearing

concerning Mr. Cousin's absence from the proceedings on doctor's instructions which satisfied the ALJ.

5) The AD ignored the enormous amount of evidence in the record establishing the facts that IRS never believed there was, and IRS admitted it never found evidence of any IRS violation when it subpoenaed the bank records Mr. Cousin produced. Instead he states the IRS agents "duty required him to" issue subpoenas further stating they were "in the course of an IRS investigation," A45, A46 and "the chain of events was commenced by the proper issuance of a subpoena," A52 and was "a legitimate law enforcement inquiry." A55.

The record is clear that the subpoenas were part of a major organized crime investigation as to which all inquiry was prohibited in proceedings below and the IRS knew Mr. Cousin was innocent of any wrongdoing, but wanted to develop him as an informer. The AD, reversing the ALJ, ignores these facts, holding "Respondent provides no creditable, alternative explanation of his behavior and the AD is unable to discern one." A46. Thus he shifted the burden of proof to Mr. Cousin and ignored a record that deals extensively with the history of how the IRS sought out Mr. Cousin by subpoena, worked for four years to develop him as an informer, failed to do so, then waited years before securing an indictment.

6) The AD's finding reversing the ALJ that "the entire bribery scheme was caused by his (Cousin's) design and overtures" is clearly erroneous. The IRS agent first, and repeatedly, asked Mr. Cousin for help for his family and admitted he asked for gifts at the hearing in the face of overwhelming evidence from his own tape recorded words. See, e.g. RIIA1207, 1216.

The Parlante bribery scheme was suggested, designed and could have been accomplished only through the initiative of the IRS agent. The AD's findings that "the entire bribery scheme was caused by his design and overtures," A52 and Cousin "hatched," A64 and carried out the plan to have the Parlante's offer the IRS agent a bribe is belied by the record and the circumstances. The IRS issued the subpoenas, it

directed Cousin, it met Parlante and took his bribe to which he plead guilty. If it had no basis for believing Parlante was evading taxes and would bribe an IRS agent its conduct throughout was illegal, Parlante's conviction should be vacated and the IRS personnel involved disciplined.

7) Perhaps no argument of the AD establishes more clearly his commitment to his own absolute power that his finding

> Respondent's illegal conduct damages the bank official's credibility with its regulator and interferes with the federal regulatory process, with the consequence that no depositor can be confident that his or her deposits enjoy the safeguards the regulatory system provides. A56.

This is to say if OTS doesn't approve of a banker, he can be removed because depositors will have no confidence in him. The ALJ ruled that the statutory "effects" test for Count I had not been met and recommended that Count I be decided in Mr. Cousin's favor. The AD refused to accept this recommendation and took a position that in effect nullified the statutory "effects" requirement.

To accomplish this extraordinary result, the AD held that once he finds a banking official to have engaged in illegal conduct, the conduct damages the bank official's credibility with OTS therefore no depositor would ever be confident that his or her deposits enjoy the safeguards the regulatory system provides. The statutory "effects" test was met for the AD by the depositors' presumed loss of confidence in a bank official because the OTS feels he lost credibility, thus proving that the interests of depositors "could be seriously prejudiced," 12 U.S.C. §1464(4)(A). With the banking official's credibility damaged in the eyes of OTS, depositor confidence that respondent would communicate with regulators with the requisite candor "could be" destroyed, subjecting deposits "to a substantially greater risk than at an institution where the management cooperated with government oversight." A57. Thus, once OTS decides that a banking official has engaged in

misconduct his credibility with OTS is damaged and the effects test is met, without more.

8) Other examples of the AD's inability to weigh the evidence judiciously without impermissible bias in favor of the result the agency is seeking can be found in his view that neither the undeniable absence of "demonstrable significant loss" to the bank nor the role of FDIC insurance in bolstering depositors' confidence, is an obstacle to meeting the "effects" test, A57, in both instances again rejecting the contrary findings of the ALJ, A58. The AD was not only unwilling to see the Bank's successful operation and the absence of any losses much less the devastating failures that have plagued the savings and loan industry as points in Mr. Cousin's favor, he perversely takes the position that the absence of loss merely illustrates the appropriateness and effectiveness of the suspension OTS imposed on Mr. Cousin. The AD comments such action may have "prevented substantial financial loss," A58, and that without the action taken by OTS "It was reasonable to expect... the deterioration of public confidence in the Association would have been more severe and the withdrawals could have been significant." Id. This theory by the AD of loss averted is fantasy for which no support can be found in the ALJ's decision or in the facts. Deputy Regional Director Simone never made such a claim.

B. Arbitrary Actions Of The OTS Violated Due Process Of Law

Among the many arbitrary acts of the OTS in this case were the following:

1) OTS without precedent acted to remove a bank official for alleged violations of criminal law that were unrelated to banking where there was no conviction and no pending indictment, or criminal investigation. It then proceeded to prosecute the case as if it was a district attorney before a criminal court seeking to establish each element of a criminal statute.

While an indictment is pending OTS has authority to

suspend a banker if it finds banking interests, or public confidence are threatened. 12 U.S.C. §1818(g)(1). If convicted, OTS would have authority to remove a banker if it found such interests were threatened. 12 U.S.C. §1818(g)(1). The statutes empower OTS to seek to suspend and remove a bank official even after acquittal of a criminal charge, but not by retrial. See, 12 U.S.C. §1464(d)(5).

OTS recognizes in this very proceeding the absence of any need for it to adopt criminal law standards, procedures and techniques, obtain evidence of crime and charge a banker with criminal acts to be proven in a administrative hearing in order to remove him from office for such conduct. It proceeded in Count II in the alternative by charging Mr. Cousin with unsafe or unsound banking practices, or a breach of fiduciary duty, both acts relating to banking, rather than attempting to prove bribery, aiding and abetting and other crimes.

Such a proceeding has the dual sensibility of addressing matters of concern to the regulation of savings banks and it keeps OTS which has enough to do out of the limitless expanse of a very dubious and peculiar form of criminal law practice. OTS ought to be concerned with the protection of the S & L industry. It should not look for criminal acts law enforcement chooses not to prosecute that are unrelated to banking to adjudicate removal of bank officers.

The consequences of OTS reliance on the alleged violation of criminal law unrelated to banking are seen throughout the hearing and its review. Grand jury subpoenas, wire taps, criminal investigators, files of the U.S. Attorney, IRS and other offices, fields of law remote from banking concerns such as bribery, corruption, aiding and abetting, illegal gratuity, entrapment became the subject matter of a hearing to determine whether a bank official should be removed from office. OTS personnel, the ALJ, the Director of OTS became immersed in facts and law in a pseudo criminal trial wholly foreign to their duties and expertise and unrelated to banking. The improbability of effective or meaningful analysis of complex, irrelevant criminal law issues is compounded by the unattractive spectacle of a banking agency acting like a criminal

court, but applying administrative procedures and standards to determine whether a bank official committed a crime he will not be prosecuted for but for which he may be proclaimed to be guilty by a government banking agency. When the stigma that attaches to a person convicted of crime is considered, there are important reasons in policy as well as constitutional law not to permit civil agencies to play charades with criminal charges.

Presumably the AD would know if there has ever been a case of removal of a bank official based entirely on commission of an alleged criminal act unrelated to banking without a pending indictment, or criminal conviction, in which a civil administrative determination of guilt was made. He has not cited one. OTS acknowledges it never before framed a complaint to charge commission of a crime to be determined in its own proceeding before.

2) The Acting Director ruled, contrary to the recommended opinion of the ALJ, A76, A103, that he had the power to remove Mr. Cousin for an act he deemed dishonest though unrelated to banking. A60. The law requires that to find culpability the misconduct charged must relate directly to the Bank and threaten its safety and soundness. Kim v. OTS, supra, 40 F.3d 1050; Brickner v. FDIC, 747 F.2d 1198, 1203 (8th Cir. 1984); In the Matter of Stoller, FDIC -90-115e, I FDIC Enforcement Decisions and Orders, ¶5174, p. A-1865 (Feb. 18, 1992).

Once again the AD seeks sweeping powers beyond any rational connection with the protection of the savings and loan industry. There is no basis in the law, or the cases, for the view that Congress empowered the Director of OTS to remove bank officers for any act the Director in his absolute discretion deems personally dishonest. Had the Congress so intended, it is doubtful that so vague a standard as personal dishonesty without any requirement that it be related to banking could meet constitutional standards which require reasonable notice of the offense and a rational connection between what is prohibited and what a stated permissible policy seeks to protect.

3) The OTS action was filed six years after the earliest allegedly illegal acts and 2 1/2 years after publicity from government press releases concerning all of the alleged conduct. OTS was unable to show any injury resulting from the alleged acts or the publicity about them at the time it filed its action alleging such injury or at the time of the hearing. Despite this absence of any injury and the impossibility of causally related injury after so many years, the AD found that the acts "could" seriously prejudice the interests of bank depositors. A53. He rejected the ALJ's finding that there was no possibility of substantial financial loss despite the fact that no loss had occurred and a loss could not now happen.

The AD even argued and cited cases for the proposition that he should not have to wait until injury occurs before removing a bank officer in this case where he waited for years knowing no injury occurred before filing his action. It was impossible that any injury could be suffered in 1993 when the proceeding was filed and 1995 when it was decided from such alleged acts in 1987-88 publicized in 1990. Yet OTS pleaded this to be so in 1993 and the AD so held in 1995, rejecting the ALJ's finding. Such arbitrary action violates due process of law.

The Court of Appeals adopted the AD's unsupportable findings and conclusions, observing that while it would be insufficient to base a finding of injury on a banker's credibility "with OTS alone, in "combination" with a finding of injury to depositor confidence which could lead to an exodus of depositors, the evidence was sufficient. A20-21. His unsupported finding of injury to depositor confidence became the sole basis for finding injury and the removal of Mr. Cousin.

4) The AD's finding that Mr. Cousin's alleged disclosure of confidential bank information constituted an unsafe and unsound banking practice and breach of fiduciary duty was arbitrary and not supported by substantial evidence. Mr. Cousin's provision of such information to IRS agent McLaughlin was lawful. OTS regulations, see e.g. 12 C.F.R. §563.180(d), impose a broad obligation on banking officers to

report crimes and suspected crimes to appropriate law enforcement authorities. An agent of the Internal Revenue Service is an appropriate authority to receive a report about suspected income tax evasion. Joan Parlante urged Mr. Cousin to make disclosure: "Whatever they want. Give it to them." RIIA1055. Her consent was genuine and comprehensive and eliminates disclosure as a basis for removal. Raikos v. Bloomfield State Bank, 703 F.Supp. 1365 (S.D.Ind. 1989) upholds a bank's informal furnishing of a customer's documents to an IRS agent.

There was no improper disclosure. No documents were furnished. Mr. Cousin gave the IRS agent, after months of being pressured to help him make cases, the names of the Parlantes whom he believed were evading taxes. He insisted on and received assurances from IRS that there was a basis for tax prosecution. He also provided a social security number and some garbled income information apparently from a mortgage application which was read to him over the phone in the presence of the IRS agent who secretly recorded the conversation. The only meaningful information he provided was the names, since the IRS agent had said he would cause subpoenas to be issued.

5) An OTS statute provides:

> ... no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order. 12 U.S.C. §1818(i)(1).

The Regional Director of OTS who was involved in all OTS removal efforts against Mr. Cousin, conceding OTS was not a party, requested a federal court in May 1992 to include language in a Court order dismissing an indictment against Mr. Cousin not on the merits, but solely on the basis of his physical condition. The language requested would state that the dismissal did not constitute a final disposition of the indictment for purposes of 12 U.S.C. §1818(g). An order with that language was entered without objections by the U.S. Attorney,

or Mr. Cousin's lawyer. The OTS was necessarily aware at that time of this Court's decision in Federal Reserve Board v. M Corp, 502 U.S. 32 (1991) which held courts have no subject matter jurisdiction to enter such an order because of 12 U.S.C. §1818(i)(1). The Regional Director two months later informed the bank board of directors and officers that by virtue of that language in the court order, the OTS order suspending Mr. Cousin on the basis of the indictment was still in effect.

Shortly thereafter in September 1992, counsel for Mr. Cousin appealed to the Director of OTS to acknowledge that his order suspending Mr. Cousin was no longer in effect. The Director rejected the request and threatened Mr. Cousin with civil money penalties if he attempted to associate in any manner with the bank. In early 1993 after several exchanges of correspondence, Mr. Cousin filed suit for a declaratory judgment that he was not under an order of suspension.

Three months later OTS initiated its formal proceeding to prohibit Mr. Cousin from engaging in banking, which is on review here, but it did not seek to enjoin his doing so, relying instead on the court order reciting it was not a final disposition under §1818(g), thereby depriving Mr. Cousin of a statutory right to review suspension immediately. 12 U.S.C. §1818(f).

Mr. Cousin appealed the adverse decision by the District Court denying him a declaratory judgment on the grounds that he had waived his right under the statute to have his suspension terminate on dismissal of the indictment.

The appeal of the District Court's decision was argued in September of 1994. Thereafter in October 1994, the case having been in litigation for 20 months, the OTS moved the Court of Appeals to dismiss the appeal as moot on the grounds that the AD had entered an order against Mr. Cousin prohibiting him from engaging in banking in its administrative proceeding commenced in May 1993.

After Mr. Cousin appealed the AD's order to the Court of Appeals, that Court consolidated the two appeals and rescheduled argument in the declaratory judgment suit to be

heard with the appeal from the AD's decision. Thereafter the Court of Appeals held the issues in Mr. Cousin's case seeking a declaration that the courts had no subject matter jurisdiction to enter the order stating the dismissal of the indictment was not a final disposition for purposes of §1818(g) to be moot.

Mr. Cousin had effectively been prevented by OTS from engaging in banking for nearly two and a half years and forced to litigate his rights under threats of sanctions based on language in the court order procured by OTS in violation of its own statute which it vigorously asserts to prevent judicial interference with its acts. See, Federal Reserve Board v. M Corp, 502 U.S. 32 (1991); Henry v. OTS, 43 F3d 507 (10th Cir. 1994) holding courts do not have subject matter jurisdiction over subject matter described in §1818(i)(1).

II. The Court Of Appeals Failed To Carefully Review OTS's Acts And Decision

Far from providing heightened scrutiny of OTS proceedings to protect constitutional rights, the Court of Appeals approved with general conclusory comments virtually every act of the AD. Most remarkably the Court stated "The AD accepted the ALJ's findings of facts, as recited above, in their entirety." A11-12. This statement is incomprehensible and clearly erroneous. As shown the AD reversed nearly all the ALJ's findings of fact.

The record reveals the serious health condition suffered by Mr. Cousin in every surreptitious recording from 1987 on, including comments about numerous hospitalizations, medical procedures, visits to doctors, pain, medications such as Cardizem CD, 180 mg. once a day, for angina. The indictment against him was dismissed on health grounds after the court appointment of an examining doctor and a hearing. The ALJ accepted medical evaluations supporting Mr. Cousin's request that he not appear at his OTS hearings. In spite of this record the Court of Appeals sarcastically refers to Mr. Cousin's "remarkable recovery", A4, and later comments he should be "grateful for his miraculous recovery." A19. There is no basis whatsoever in the record for such comments and they reflect

some unidentified inability to fairly review the OTS proceeding, or decide the appeal in the declaratory judgment suit.

The Court wrongfully attributes arguments to Mr. Cousin's counsel that were not made, then states "It is disingenuous and contemptible for Cousin to assert that the AD erred in finding a violation of the law when a criminal indictment concerning the matter has been voluntarily dismissed by the government." A19. Cousin's argument in the Court of Appeals, as here, is that OTS has no statutory authority, or interest in undertaking proceedings based on alleged dishonesty or criminal acts which are unrelated to banking where there is no criminal investigation, indictment or conviction based on those acts.

The Court erroneously relies on testimony by a Max Fodera. A18. Max Fodera did not testify. It states the government acquiesced in the dismissal of the indictment only on the condition that language preserving the proceedings before the OTS be included. This is misleading. OTS alone asked for the language. The U.S. Attorney had agreed to the dismissal before the OTS request which violated its own statute. The Court says Mr. Cousin's attorney approved that language, but counsel only stated he had no objection. RIA85. The Court ignored Mr. Cousin's passionate protest later expressed in a letter to the District Judge who dismissed the indictment. A116.

The Court disposed of Mr. Cousin's claims that denial of discovery and evidentiary rulings unlawfully restricted his right to present his defenses to charges of misconduct, absence of harmful effects, culpability, entrapment and outrageous government misconduct by asserting the evidence clearly established his guilt. A22. While the wholly conclusory assertion by the Court is unsupported in the record and contradicted by Agent McLaughlin himself, the evidence Mr. Cousin sought and was denied might have proved his innocence and established defenses he asserted.

Mr. Cousin was denied access to, among other things, OTS documents of bank examinations showing the Bank's

condition at relevant times, and documents to negate any harmful effects to the Bank or its depositors resulting from conduct of Mr. Cousin. Mr. Cousin requested a subpoena duces tecum to compel production of all tape recordings and their transcriptions and IRS memos and reports involving him which would have shown the full extent of Agent McLaughlin's wrongful conduct and his inducement, enticement and manipulation of Mr. Cousin. Cross-examination of IRS agents McLaughlin and Fanelli was severely restricted by repeated assertions that questions violated Fed.R.Cr. 6(e) protecting grand jury functions or IRS instructions limiting authorization for the IRS agent's testimony. Objections were sustained to questions to Agent McLaughlin about the underlying investigation on grounds of grand jury secrecy under Fed.R.Cr.P. 6(e). These restrictions improperly limited respondent's proof because they were erroneously applied to matters outside the reach of Rule 6(e). At the hearing, as well as at the pre-hearing deposition of Agent McLaughlin, counsel for IRS interposed repeated objections which were sustained to questioning of the IRS agents, on the ground it went beyond a limited IRS authorization for their testimony which purported to restrict their testimony to facts about the bribes charged.

Restrictions on cross-examinations of Deputy Regional Director Simone seeking to establish the absence of any basis for his opinion concerning harmful effects of Mr. Cousin's acts and his culpability and conflicts of interest, deprived respondent of his right to compel testimony and the production of documents to show government misconduct and entrapment and denied Mr. Cousin his right to present affirmative defenses that would have entitled him to the dismissal of the charges against him.

The Court of Appeals summarily approved the AD's findings and rulings. Judicial review provided no protection for the important rights violated by OTS.

While courts have approved statutes that vest investigation, prosecution and adjudication under a single agency head, they have recognized the risks inherent in such power. The OTS is delegated the combined functions of

investigation, prosecution and adjudication. The Director is a virtual czar with absolute power over all functions of the agency who can set aside findings of fact by an ALJ and make his own findings from a written record, whether he personally reviewed it or not, subject only to appellate review by the judiciary.

Where an agency head does not accept the findings and conclusions of an ALJ, the courts have recognized their duty to carefully scrutinize the proceedings. See Young v. U.S. Department of Agriculture, 53 F.3d 728, 732 (5th Cir. 1995); Aylett v. Secretary of Housing and Urban Development, 54 F.3d, 1560, 1566-67 (10th Cir. 1995). Where such heightened scrutiny fails, due process rights are at risk.

The findings and conclusions of the AD are "undeserving of judicial deference" and should be subjected to heightened scrutiny, not only because the AD has departed so drastically and cavalierly from the ALJ's determinations, but because the AD's rulings consist of "mere 'litigating positions,'" interpretations formulated during litigation and unsupported by OTS regulations, rulings or administrative practice. See Bowen v. Georgetown Univ. Hospital, 489 U.S. 204, 212 (1988); Martin v. OSHRC, 499 U.S. 144, 155-56 (1991). There is no OTS regulation which calls for removal for acts unrelated to banking or which authorizes continuation of a suspension under §1818(g) if no indictment is pending. Nor is removal here supported by agency practice. OTS removal as well as other disciplinary matters such as cease-and-desist cases invariably involve banking misconduct.

Here the regional director of OTS unilaterally requested a federal court which did not have subject matter jurisdiction to modify an order of dismissal to continue an OTS suspension order in violation of law. The agency relied on that order for nearly a year before the same Regional Director initiated an OTS proceeding. Even then, OTS asserted and relied on the Court order to threaten Mr. Cousin with sanctions for another year and a half before entering its own order against him.

From the moment OTS secured judicial assistance from the District Court to support a suspension for which there was no statutory authority, it had an extraordinary need to vindicate its own conduct and to prevail against Mr. Cousin in the removal proceeding it belatedly filed. This contributed to the excessive zeal evident throughout the record.

OTS then compounded the risks created by the absence of separation of powers by not only investigating and prosecuting the proceeding but by providing all the testimony as to the effects of Mr. Cousin's acts through its own Deputy Regional Director. This is the same official who had direct supervisory responsibility over the bank involved and who first alerted enforcement officials of newspaper reports of Mr. Cousin's arrest in 1990. The AD reversed the ALJ's finding that Director Simone's testimony was insufficient to show potential substantial harm, ignoring as well that Simone could point to no actual injury six years after the acts and four years after the publicity about them. A55, RIIA1373-74. The AD failed to address the conflict of interest created by Simone's testimony under OTS regulations. See, 12 C.F.R. 509.3(c), 509.40(c). The possibility of fairness under such circumstances where an agency is zealously committed to a result from personal interest in a matter that does not even involve, or affect banking was non-existent.

The Court of Appeals rejected the arguments that the AD was biased and acted to protect the agency as having "no merit." concluding "The process by which Cousin was barred from future participation in any federally insured banking institution was statutorily mandated and entirely constitutional." A17

Conclusion

Mr. Cousin's petition for a writ of certiorari should be granted.

Dated: New York, N.Y.

April 2, 1995

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1680, 297—August Term, 1994

(Argued: June 23, 1995 Decided: January 3, 1996)

Docket Nos. 94-4206, 94-6070

MICHAEL COUSIN,

Petitioner,

—v.—

OFFICE OF THRIFT SUPERVISION,
Department of Treasury,

Respondent.

Before:

KEARSE, ALTIMARI and PARKER,

Circuit Judges.

Appeal from denial of declaratory judgment seeking dismissal of temporary suspension and prohibition and petition for review of Final Decision and Order of the Acting Director of the Office of Thrift Supervision,

Department of the Treasury (Jonathan L. Fiechter), prohibiting Cousin from further participating in any manner, in the conduct of the affairs of any banking institution regulated by the Office of Thrift Supervision.

Petition for review of Final Decision and Order is DENIED. Appeal of denial of declaratory judgment is DISMISSED as moot.

RAMSEY CLARK, New York, New York (Lawrence Schilling, New York, New York, on the brief), *for petitioner*.

GERALDINE R. GENNET, Office of the Chief Counsel, Office of Thrift Supervision, Washington, D.C. (Carolyn B. Lieberman, Thomas J. Segal, Elizabeth R. Moore, Dirk S. Roberts, Office of the Chief Counsel, Office of Thrift Supervision, Washington, D.C., on the brief), *for respondent*.

ALTIMARI, *Circuit Judge*:

Petitioner Michael Cousin ("Cousin") seeks review of a Final Decision and Order of the Acting Director ("AD"), Jonathan L. Fiechter, of the Office of Thrift Supervision ("OTS"), Department of the Treasury, prohibiting Cousin from further participating in any manner, in the conduct of the affairs of any banking institution regulated by the Office of Thrift Supervision. Cousin's permanent prohibition made final a temporary suspension and prohibition which had previously been issued

by the OTS, the issuance of which Cousin had appealed before this Court. Cousin now argues that 1) the procedure by which the OTS issued a permanent prohibition against Cousin violated his due process rights under the Fifth Amendment to the United States Constitution; 2) the Final Decision and Order was not supported by substantial evidence on the record; and 3) the AD improperly denied Cousin's defense of entrapment and outrageous government misconduct. Because we find Cousin's arguments to lack merit, we deny his petition for review of the OTS's Final Decision and Order. We further dismiss Cousin's appeal concerning the temporary suspension and prohibition as moot.

BACKGROUND

A. *Procedural History*

On August 8, 1990, Cousin, then-chairman of the Board and chief executive officer of Cross County Federal Savings Bank ("County Federal" or "Bank"), was charged in federal court with several counts of bribery. The OTS was informed of the charges and, two days later, issued a temporary suspension and prohibition from participation in the affairs of County Federal. After an administrative hearing on March 1, 1991, the temporary suspension and prohibition was continued until final disposition of the criminal charges pending against Cousin.

Cousin then sought to have the criminal indictment against him dropped in federal court, asserting that he was neither physically nor mentally fit to stand trial. The district court agreed to dismiss the indictment against Cousin because he was not physically capable of stand-

ing trial; however, included in the order dismissing the charges against Cousin, dated May 25, 1992, was language—agreed to by Cousin's attorney—to the effect that the dismissal of the indictment did not amount to a dismissal on the merits. *See Cousin v. Office of Thrift Supervision*, 840 F. Supp. 8, 9-10 (E.D.N.Y. 1993). The language was specifically included in the order to ensure that the dismissal was not construed as requiring the discontinuation of the OTS's temporary suspension and prohibition against Cousin. *Id.* at 11.

Upon dismissal of the indictment for health reasons, Cousin underwent a remarkable recovery and informed the OTS that he was sufficiently physically and mentally fit to reenter the banking world. Despite the explicit language in the order dismissing his indictment, Cousin thereafter sought a declaratory judgment in the district court stating that his indictment had been dismissed on its merits and that, as a matter of law, the OTS temporary suspension was required to be lifted. *Id.* at 8. In light of the language in the order dismissing his indictment—language which Cousin himself had agreed upon—the district court dismissed Cousin's suit on waiver grounds. *Id.* at 11. Cousin then appealed the district court's dismissal of his action.

On May 13, 1993, the OTS instituted a proceeding to permanently prohibit Cousin from further participating in any manner, in the conduct of the affairs of any banking institution regulated by the OTS. In support of the permanent prohibition, Cousin was charged with bribery and aiding and abetting bribery. He responded to the OTS claims and asserted a number of affirmative defenses, focusing primarily upon entrapment. A hearing of the claims was held before Administrative Law Judge ("ALJ") Walter J. Alprin between September 13 and 15,

1993. On March 31, 1994, the ALJ issued his recommended decision and order, disqualifying Cousin from further participation in any federally insured banking institution. By Order dated October 11, 1994, the AD accepted some of the ALJ's findings, rejected others, and issued a permanent prohibition against Cousin's further participation in the banking industry.

Cousin now petitions for review of the Final Decision and Order of the AD. Because Cousin's previous appeal is necessarily resolved by this petition for review of the superseding Final Decision and Order, that appeal was referred to this panel by order of the Court on December 30, 1994, and is resolved below.

B. *The ALJ's Recommended Decision and Order*

1. *Findings of Fact*

In his March 31, 1994, recommended ruling, ALJ Alprin made the following specific factual findings.

While investigating criminal activities unrelated to Cousin, IRS Special Agent Kevin McLaughlin ("McLaughlin") subpoenaed Cousin's bank records in late 1986. In response to the subpoena, Cousin contacted McLaughlin and suggested that he was willing to meet with him and voluntarily produce everything subpoenaed by the government. At a meeting with McLaughlin on May 27, 1987, Cousin offered to make a monetary contribution to the charity of McLaughlin's choice. McLaughlin took Cousin's offer to be an attempt at bribery. After discussing this conversation with his superiors at the IRS, McLaughlin was directed to engage in an undercover operation to determine if Cousin would follow through with his offered bribe. Cousin did,

in fact, follow through with his promise; on June 9, 1987, in his office at County Federal, Cousin gave McLaughlin $1,750 in cash and a silver bar.

In an effort to determine if Cousin would engage in further bribery, the IRS served a grand jury subpoena on All Queens Tudor Realty, Inc., an organization in which Cousin had a financial interest. Cousin again met with McLaughlin in his office at the bank, on February 10, 1988, and offered to pay him if he would quash the subpoena. On February 18, 1988, Cousin invited McLaughlin to his office, where he gave the IRS agent $6,500.

A short time later, Cousin conceived of a scheme in which McLaughlin could receive additional bribes. According to McLaughlin's testimony, Cousin suggested that he "could give me some information on some individuals, that I could open up a case, and then he could arrange for them to pay me money to kill that case that I had opened up." In furtherance of his plan, Cousin arranged for an associate of his, Max Fodera ("Fodera"), to act as an intermediary in the bribery scheme. On May 11, 1988, Cousin acquired the bank files of Joan and John Parlante, who he believed to be engaged in tax evasion. Cousin informed McLaughlin of his hunch, which he based upon the fact that the Parlantes made their mortgage payments in cash and under-reported their income. To assist McLaughlin in acquiring a subpoena of the Parlantes' files, Cousin provided him with the Parlantes' social security numbers, business names, location of houses and business, and salaries. At the time that Cousin revealed this confidential bank information, he had no authority to do so, nor did County Federal inform the Parlantes that the information had been revealed.

On August 15, 1988, a subpoena was served upon Cousin for the Parlantes' bank files and the Parlantes were notified of the pending tax investigation. Mrs. Parlante instructed Cousin to provide any and all information the IRS requested. Cousin, however, informed Mrs. Parlante that he knew she could bribe McLaughlin into dropping the investigation. Mrs. Parlante resisted the idea. A short time later, however—after a second grand jury subpoena had been served upon the Parlantes requesting information about their business—Mr. Parlante met with Cousin to discuss the possibility of arranging a bribe. Cousin instructed Mr. Parlante on how to bribe McLaughlin, using Fodera as an intermediary, which Mr. Parlante did on October 20, 1988, paying McLaughlin $25,000 to have the IRS investigation ended.

2. *Applicable Law*

Under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. No. 101-73, 103 Stat. 183 (1989), the OTS has the authority to apply the remedies established under FIRREA to actions taken prior to 1989. *See In re Keating*, OTS Order No. AP 91-20 at 17-23 (May 11, 1991), 1991 WL 540752, *9, *13 n.8 (O.T.S.). In doing so, the OTS must apply the standard for liability established at the time of the conduct. *Id.* Because the conduct in the case at hand occurred in 1987 and 1988, it is necessary to apply pre-FIRREA law. Specifically, pursuant to 12 U.S.C. § 1464(d)(4)(A) (1982) (for current provision, *see*, 12 U.S.C. § 1818(e) (1994)), the OTS may bar an officer from future participation in the affairs of a federally insured banking institution if it finds that the officer has:

[1] committed any violation of law, rule, or regulation . . . , **or**

has engaged or participated in any unsafe or unsound practice in connection with the association, **or**

has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer,

and

[2] the Board determines that the association has suffered or will probably suffer substantial financial loss or other damage[,] **or**

that the interests of its savings account holders could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, **or**

that the director or officer has received financial gain by reason of such violation or practice or breach of fiduciary duty,

and

[3] that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, **or**

a willful or continuing disregard for the safety or soundness of the association.

12 U.S.C. § 1464(d)(4)(A) (1982) (emphasis and format added). These three sub-sections of § 1464(d)(4) have come to be known as the (1) "misconduct," (2) "effect," and (3) "culpability" prongs of the prohibition test. *See Oberstar v. Federal Deposit Insurance Corporation*, 987

F.2d 494, 500 (8th Cir. 1993) (construing 12 U.S.C. § 1818(e)).

In the administrative hearing against Cousin, the application of § 1464(d)(4) focused upon two counts of wrongdoing: Count I concerned Cousin's bribery of McLaughlin in 1987 and 1988 and Count II addressed Cousin's disclosure of confidential bank information as part of his aiding and abetting in the bribery of McLaughlin in 1988.

3. *Count I: Bribery*

As to Count I, the ALJ found that Part (1) was met by Cousin's bribery, which was a violation of the law. While Cousin argued that the OTS must show a breach of law related to the banking industry, the ALJ determined that the breach of any law was sufficient so long as it had "a specific nexus to direct repercussions in banking depository institutions." The ALJ determined that the 1987 bribery charge was not supported by a preponderance of the evidence, but that the 1988 bribery charge was. In his defense, Cousin asserted that the 1988 bribe was a result of entrapment. The ALJ rejected Cousin's claim, pointing out that the government was responsible for initiating virtually none of the contacts with Cousin leading up to the bribe. Thus, the ALJ determined that because Cousin had "violated a law," the misconduct prong was met.

Despite finding that Cousin's Count I constituted a violation of the law meeting the requirements of Part (1), the ALJ determined that the OTS could not establish the requisite "effects" of Part (2). Under the financial loss provision of the effects prong, the OTS was required to demonstrate that, as a result of Cousin's criminal act, his financial institution "has suffered or will probably suf-

fer *substantial* financial loss." (emphasis added). While the ALJ found that the institution might suffer some loss, it did not find the potential for *substantial* loss as required by the pre-FIRREA law (§ 1818(e)(1)(B)(i)—FIRREA's effects prong—requires only that the institution will probably suffer "loss" not "substantial loss"). Therefore, the ALJ held that the effects prong was not met and Count I was insufficient to justify permanently barring Cousin from conducting the affairs of any federally insured banking institution.

Finally, as to Part (3), the ALJ determined that in order to sustain a permanent prohibition, Cousin must have acted in a manner that "evidence[d] willful or continuing disregard for the safety or soundness of [County Federal] itself." While the ALJ found Cousin to have demonstrated personal dishonesty, he found the particular dishonesty in Count I did not impact upon the banking institution or upon Cousin's dealings with the institution. Thus, the OTS failed to meet the culpability prong with respect to Count I as well.

4. *Count II: Aiding and Abetting Bribery*

As to Count II, the ALJ determined that Cousin's actions violated all three subparts of the misconduct prong; the revelation of confidential bank information for the sake of aiding and abetting bribery 1) was a violation of law with a nexus to the banking institution, 2) was an unsafe and unsound practice, and 3) was a breach of fiduciary duty. The ALJ found that the OTS had shown by a preponderance of the evidence that Cousin had aided and abetted in the Parlantes' act of bribery. Looking to the record of the House hearing on the Financial Institution Supervisory Act of 1966, the ALJ concluded that Cousin had committed an unsafe and

unsound practice when he misused his position in the Bank by revealing confidential information which he obtained through his position of authority. *See also* Right to Financial Privacy Act, 12 U.S.C. §§ 3401 *et. seq.* (1988) (conditions for providing government officials with customer's financial records). Furthermore, the same revelation of confidential information amounted to a breach of Cousin's fiduciary duty to the Parlantes, County Federal customers.

As to Part (2), the ALJ determined that "the disclosure and misuse of confidential bank information is integrally related to [Cousin] and his position at [County Federal]." In light of the testimony presented at the hearing, the ALJ concluded that the revelation of confidential information was a sufficiently gross breach of Cousin's responsibilities as Bank president that an exodus of customers might result; such an exodus would amount to ***substantial*** harm, meeting the mandates of Part (2).

Finally, the ALJ found that Cousin met the culpability prong when he not only acted dishonestly, but when his dishonesty demonstrated a "willful and continuing disregard for the safety and soundness of [County Federal]." Accordingly, all of the requirements for pre-FIRREA removal under 12 U.S.C. § 1464(d)(4) were met by Cousin's actions. The ALJ recommended Cousin's removal and prohibition from further participation in the affairs of any federally insured financial institution.

C. *The AD's Decision and Order*

Despite reaching the same conclusion as the ALJ—namely, that Cousin should be permanently barred from participating in the affairs of any federally insured institution—the AD disagreed with the ALJ on a number of counts. The AD accepted the ALJ's finding of facts, as

recited above, in their entirety. However, when pertinent to his evaluation of the law, the AD made additional factual determinations.

1. *Count I: Bribery*

Despite the ALJ's determination that there was insufficient evidence to support a finding that Cousin's activities in 1987 amounted to bribery, the AD held that there was clear evidence on the record, albeit circumstantial, to support such a finding. The AD determined that there was sufficient evidence to show by a preponderance of the evidence that Cousin, 1) corruptly, 2) gave $1,750 and a silver bar, 3) to McLaughlin, a government official, 4) in order to induce him into quashing the subpoena. *See* 18 U.S.C. § 201(b)(1)(C) (1988) (elements of bribery); *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988) (same), *cert. denied*, 489 U.S. 1083 (1989). The AD drew further support for his determination from the fact that Cousin presented no witnesses on his behalf and did not testify in order to rebut the bribery charge. *See Office of Thrift Supervision v. Lopez*, 960 F.2d 958, 965 (11th Cir. 1992) (adverse inference may be drawn from failure to testify on own behalf). In addition, the AD found that there was sufficient evidence to demonstrate that Cousin had illegally offered a federal official a gratuity. *See* 18 U.S.C. § 201(c)(1)(A) (elements of illicit gratuity). As to these offenses, the AD rejected Cousin's entrapment defense and his assertion that the OTS was limited to punishing violations of banking law.

With respect to the effects prong, the AD rejected the ALJ's conclusion that there was insufficient evidence of potential substantial harm to the bank's depositors from Cousin's wrongdoing. The AD held that the harm to the bank need only be *potentially* substantial, *see In re*

Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984); that substantiality requirement was met, according to the AD, by 1) the serious risk of harm to County Federal's reputation from its director's actions, and 2) the inevitable damage to the credibility of the bank official (Cousin) with the OTS and the resultant interference with the regulatory process that could potentially arise. Accordingly, the AD found that Cousin's actions satisfied Part (2) of the test.

Finally, in keeping with his finding as to the intentional illegality of Cousin's actions charged in Count I, the AD determined that those actions demonstrated "personal dishonesty" on the part of Cousin. Moreover, the AD rejected the ALJ's conclusion that the personal dishonesty charged need necessarily relate to banking activity; rather, the AD held that the OTS need only demonstrate that the individual charged has engaged in some activity which displays dishonesty. Thus, the AD concluded that Count I was sufficient to justify Cousin's prohibition and removal from engaging in banking activity.

2. *Count II: Aiding and Abetting Bribery*

As to Count II, the AD concluded:

> The Acting Director affirms the ALJ's conclusions concerning Respondent's liability under Count II. Because, however, the ALJ's analysis regarding the second and third elements of the removal/prohibition analysis imposes standards not required by the statute, the Acting Director does not adopt his analysis.

Despite rejecting the ALJ's analysis, the AD accepted the ALJ's conclusion that Cousin's actions amounted to

aiding and abetting the bribery of a federal official in violation of federal law. *See* 18 U.S.C. §§ 2(a) (aiding and abetting) and 201(b)(1)(C) (bribery); *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992); *United States v. Shulman*, 624 F.2d 384, 387-88 (2d Cir. 1980). With respect to Part (2), the AD determined that Cousin had put depositors in danger of "serious prejudice" and, therefore, it was unnecessary to consider the ALJ's determination that the bank faced potential substantial harm as a result of Cousin's actions. Because the misconduct at issue in Count II involved the "use of confidential customer information to orchestrate and assist the commission of criminal activity," the AD determined that it was even more detrimental to the interests of the depositors than was the activity alleged in Count I. The AD concluded that "[d]epositors are entitled to trust the management of depository institutions to spend their time . . . furthering the interests of the association, not committing illegal acts. . . . [B]y virtue of [Cousin's] misconduct, the interests of Cross County depositors could be seriously prejudiced."

With respect to Part (3), as discussed above, the AD determined that Cousin had demonstrated personal dishonesty. In addition, the AD found that Cousin orchestrated a bribery scheme over several months and that such behavior constituted "willful and continuing disregard for the safety and soundness of [the Bank]." *See* 12 U.S.C. § 1464(d)(4)(A) (1982). Accordingly, Count II met all the requirements for prohibition and the AD ordered that Cousin be removed from his office at County Federal, and be prohibited from further participation in any manner, in the conduct of the affairs of any institution regulated by OTS.

D. *The Appeal*

Cousin now petitions for review of the AD's decision. Specifically, Cousin asserts that 1) the AD's exercise of his "absolute discretion" violated Cousin's right to due process, 2) the AD's decision was not supported by substantial evidence, and 3) the AD and ALJ improperly excluded important evidence on entrapment and outrageous government conduct.

DISCUSSION

In reviewing final orders of the OTS, the factual determinations of AD must be accepted if supported by substantial evidence on the record. *See Seidman v. Office of Thrift Supervision*, 37 F.3d 911, 924 (3d Cir. 1994). We review the AD's legal interpretations *de novo*. *See 1185 Ave. of Americas Assocs. v. Resolution Trust Corp.*, 22 F.3d 494, 497 (2d Cir. 1994) (deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), inappropriate when statute administered by several agencies); *Wachtel v. Office of Thrift Supervision*, 982 F.2d 581, 585 (D.C. Cir. 1993) (same).

1. *Due Process*

Cousin asserts that the process by which he was permanently barred from running a federally regulated bank violated his Fifth Amendment right to due process. According to Cousin,

> [i]n the most extreme delegation of discretion yet, arising from the savings and loan scandal which cost Americans many tens of billions of dollars, Congress placed arbitrary power in the form of near absolute discretion in the Director of OTS. How

> well such absolute power served the public and the S & L industry is indicated by the tragedy which befell both on the OTS's watch.

Specifically, Cousin argues that his due process rights were violated by the mixing of investigatory, prosecutorial, and adjudicative functions by the OTS. According to Cousin, the AD acted with impermissible bias when he "arbitrarily reversed the ALJ on virtually every finding and ruling [the ALJ] made." Moreover, Cousin suggests that it is clear from the face of the AD's Final Order that the OTS had a "vendetta" against him that dictated the outcome of the hearing.

The administrative process by which Cousin was disciplined was mandated by statute and entirely constitutional. While the AD had authority over the investigative, prosecutorial and adjudicative functions performed by his agency, and while he also had absolute discretion to accept or reject the ALJ's recommended findings of fact and rulings of law when arriving at his Final Order, such combined functions and adjudicatory discretion fall well within the mandates of the Fifth Amendment. *See Withrow v. Larkin*, 421 U.S. 35, 57-58 (1975) (risk of prejudice from joint functions of administrative agency does not rise to level of due process violation). *See also Keating v. Office of Thrift Supervision*, 45 F.3d 322, 327-28 (9th Cir.) (OTS procedure permissible), *cert. denied*, 116 S.Ct. 94 (1995); *Seidman*, 37 F.3d at 924-26 (same).

Cousin asserts that the AD's exercise of his discretion demonstrated bias and was therefore a violation of his due process rights. *See, e.g., Seidman*, 37 F.3d at 924. In support of this contention, Cousin points to the numerous adverse findings made by the AD, particularly those

rejecting the recommended ruling of the ALJ. Despite Cousin's protestations, except his general insistence that the AD's Final Order demonstrates bias on its face, Cousin cannot point to a single factor indicating the AD's bias against him. As is clear from our discussion of the substance of the Final Order below, there is no merit to Cousin's claim that the AD's findings of fact and conclusions of law demonstrate bias. The process by which Cousin was barred from future participation in any federally insured banking institution was statutorily mandated and entirely constitutional. *See, generally, Seidman*, 37 F.3d at 924-26.

2. *Substantiality of Evidence*

Cousin asserts that the AD's Final Order is not supported by substantial evidence on the record. The lack of factual support for the AD's prohibition order, according to Cousin, is particularly clear from the AD's arbitrary rejection of the ALJ's factual determinations and conclusions of law. Cousin contends that neither Count I nor Count II of the AD's Final Order is sufficient to justify his prohibition from the banking industry. Because we find that the AD's Order was amply supported by Cousin's illegal actions under Count II, we need not address Count I.

A. *Misconduct*

The AD determined that, as to Count II, Cousin violated all three subparts of the misconduct prong—Cousin violated a law, engaged in an unsafe or unsound banking practice, and breached his fiduciary duties as a director of the Bank. *See* 12 U.S.C. § 1464(d)(4)(A) (1982). Specifically, the AD ruled that there was sufficient evidence to prove that Cousin had aided and abetted in the

bribery of a government official; that such aiding and abetting, which involved the revelation of confidential bank information, constituted a breach of his fiduciary duty as bank president; and, that Cousin's criminal activity, which implicated another bank employee and bank customers, amounted to an unsafe or unsound banking practice.

Cousin contends that the OTS does not have the authority to punish him for an alleged crime, when the indictment for that crime had been voluntarily dismissed by the government. Not only does Cousin argue that there is insufficient evidence to support a determination that he aided and abetted in the bribery of a government official (as is demonstrated by the dismissal of the indictment), Cousin asserts that even if he did commit such a crime, § 1464(d)(4) does not allow a prohibition order to be founded upon non-banking related violations of the law. The AD erred as a matter of law, according to Cousin, when he rejected the ALJ's proper determination that such predicate violations of the law need at least have some nexus to the banking industry.

Upon a review of the record, we find that there was ample evidence to support the conclusion arrived at by both the AD and ALJ, that Cousin aided and abetted in an illegal bribe. The testimony of Agent McLaughlin, Mr. Parlante, and Max Fodera makes clear that Cousin conceived of a scheme in which he assisted a government official in the investigation of the potential financial improprieties of County Federal bank customers so that he might ultimately orchestrate the bribery of that government official. As the AD concluded, while "it is unclear precisely what motivated [Cousin] to perpetrate his illegal scheme, it is clear that . . . . [Cousin's] purpose in providing confidential customer information to

McLaughlin was to facilitate a bribery scheme." Because the AD's conclusion was fully supported by the record, we find that the misconduct prong has been met.

It is disingenuous and contemptible for Cousin to assert that the AD erred in finding a violation of the law where the criminal indictment concerning the same matter had been voluntarily dismissed by the government. Cousin himself sought the dismissal of the criminal indictment for health reasons. While the government ultimately acquiesced and dismissed the indictment, it did so only on the condition that language preserving the proceedings before the OTS be included in the dismissal. Not only was Cousin aware of this language and its intended purpose, but the language ultimately adopted was approved by his attorney. Cousin should be grateful for his miraculous recovery which he now asserts makes him sufficiently fit to run a banking institution, and thankful that he is not facing reinstated criminal charges. This Court will not, however, give credence to such a wrongheaded and inequitable argument.

Finally, the AD's determination that the misconduct prong may be met by violations of any law, banking-related or otherwise, is clearly supported by the statute. The plain language of the statute empowers the regulatory authority to prohibit a bank director from further participating in the conduct of the affairs of any regulated banking institution if that officer "has committed *any* violation of law. . . ." 12 U.S.C. § 1464(d)(4)(A) (1982); *see Himes v. Shalala*, 999 F.2d 684, 688 (2d Cir. 1993) (court must effectuate plain meaning of statute). Had Congress intended for only banking-related violations to trigger § 1464(d)(4), it could have limited the language of the misconduct prong accordingly. *See, e.g.*, 12 U.S.C. § 1829 (1989) ("any person who has been con-

victed of any criminal offense *involving dishonesty or a breach of trust* may not participate . . . in the conduct of the affairs of any insured depository institution") (emphasis added). The AD properly determined that Congress intended no such limitation.

Because the AD's determination that Cousin aided and abetted in the bribery of a federal official is fully supported by the record, the misconduct prong is met. We need not, therefore, address Cousin's objections to the AD's alternative findings concerning breach of fiduciary duty and unsafe or unsound business practices.

B. *Effects*

Cousin also argues that the AD failed to support, with substantial evidence, his finding that Cousin's actions had harmful effects meeting the requirements of Part (2). Pointing to the fact that, since his indictment for bribery, County Federal has suffered no actual loss nor experienced an exodus of depositors, Cousin contends that the AD could not possibly find the requisite harmful effects of Cousin's alleged wrongdoing.

Despite Cousin's contentions, however, the AD stated:

> [I reject] the argument that the "effects" test requires more immediate or direct impact upon the association than establishment of the possibility of serious prejudice to the interests of the institution's depositors. Congress simply did not draft section 1464 to impose such a requirement.

The plain language of the statute makes clear that the AD's interpretation is proper. Section 1464(d)(4)(A) requires that the "interests of [the Bank's] savings account holders *could* be seriously prejudiced by reason

of such violation. . . ." (emphasis added). In light of this language, it would be irrational to require actual and immediate prejudice before a prohibition order may issue. *See In re Anonymous*, FDIC Docket No. FDIC-84-86g (regulation ineffective if regulator is unable to anticipate injury to depositors and act in advance of harmful impact); *Van Dyke v. Bd. of Governors of Fed. Reserve Sys.*, 876 F.2d 1377, 1380 (8th Cir. 1989) ("we think it unrealistic . . . to suggest the Board is powerless to respond to an officer's [wrongdoing] until actual harm to the Bank occurs"). The AD need only show sufficient evidence on the record to demonstrate the possibility of serious prejudice resulting from Cousin's illegal activities for the effects prong to be met.

In support of his finding of potential serious prejudice, the AD points to two factors: 1) Cousin's illegality could potentially injure depositor confidence in County Federal and lead to an exodus of depositors; and 2) Cousin's illicit conduct injured his credibility with the banking regulatory authority (namely the OTS), thus impairing his ability to effectively represent the Bank's interests. Both of these propositions were fully supported by the testimony of Michael Simone, an Assistant Director for the OTS in its Northeast Region. While we think that basing an effects determination on Cousin's credibility with the OTS alone would be insufficient, the AD's determination that there was a possibility of serious prejudice from the combination of the two factors cited above is appropriate and supported by substantial evidence.

C. *Culpability*

Cousin also challenges the AD's determination that Part (3) was met by his alleged wrongdoing. Cousin

points to the ALJ's conclusion that "the third prong of the statute . . . clearly intend[s] the Respondent's actions to relate to the financial institution directly, and not merely indirectly or in some peripheral manner." Contrary to the ALJ's interpretation of the statute, the AD determined that there need only be some knowing act of "personal dishonesty" to meet the requirements of the culpability prong. As the AD notes, while the second subcategory of Part (3) explicitly requires misconduct directed at the association, *see* 12 U.S.C. § 1464(d)(4)(A) (1982) ("willful or continuing disregard for the safety or soundness of the association"), no such requirement exists with respect to "such violation[s] . . . involving personal dishonesty," *id.* Accordingly, the OTS need only demonstrate "a degree of culpability well beyond mere negligence." *Kim*, 40 F.3d 1050, 1054 (9th Cir. 1984). The evidence of Cousin's bribery and breaches of confidentiality clearly support such a finding of intentional wrongdoing.

3. *Entrapment and Outrageous Government Misconduct*

Finally, Cousin argues that the AD improperly excluded evidence concerning the allegedly outrageous government conduct to which Cousin had been subjected and incorrectly denied his entrapment defense as a matter of law. We note only that the evidence credited by the ALJ and AD clearly established that Cousin conceived of the bribery scheme of his own volition and presented it, unsolicited, to Agent McLaughlin. Under such circumstances, Cousin's entrapment defense—regardless of the outrageous government conduct Cousin asserts—necessarily fails as a matter of law. *See Jacobson v. United States*, 503 U.S. 540, 549 (1992) ("the prosecution must prove beyond reasonable doubt that the defen-

dant was disposed to commit the criminal act prior to first being approached by Government agents").

CONCLUSION

The AD's prohibition order was fully supported by the evidence on the record and is proper as a matter of law. Accordingly, Cousin's petition for review of the final decision and order of the AD is denied. Because the OTS's Final Decision and Order stands, Cousin's appeal concerning the temporary suspension and prohibition is dismissed as moot.

UNITED STATES OF AMERICA
before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

IN THE MATTER OF:

MICHAEL COUSIN,

a Person Participating in the Conduct of the Affairs of Cross County Federal Savings Bank, Queens, New York

CASE NO. OTS AP 93-38
DATED: MAY 13, 1993

OTS ORDER NO. AP 94-48
DATED: OCTOBER 11, 1994

DECISION AND ORDER

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DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSION

This case arises from a criminal indictment on multiple counts of bribery and conspiracy brought in 1990 against Michael Cousin ("Respondent"), former chief executive officer and chairman of the board of directors of Cross County Federal Savings Bank, Queens, New York ("Cross County" or the "Association"). As a result of Respondent's arrest, the Office of Thrift Supervision ("OTS") issued an order on August 10, 1990, suspending Respondent from his positions with Cross County. Due to Respondent's incapacity to stand trial, the criminal indictment was later dismissed without prejudice. A condition of the dismissal, negotiated with Respondent, specified that the dismissal did not affect the pending OTS suspension order.

The OTS thereafter instituted this action, seeking an order of permanent removal and prohibition against Respondent based on two counts: (1) for bribing a federal official in 1987 and 1988 and (2) for aiding and abetting a bribe of a federal official in 1988. Respondent used his position with, and the facilities of, Cross County to commit a bribery offense, set up a bank customers to engage in illegal activities and induce a member of Cross County's Board of Directors to commit a criminal act. All of these activities could seriously prejudice the interests of the depositors, and all evidence personal dishonesty.

The gravity of Respondent's misconduct was precisely what concerned Congress when it provided that an individual convicted of certain types of criminal offenses should be automatically prohibited from the banking industry. Here, on the grounds of physical incapacity, Respondent was able to avoid trial on the merits in a criminal forum. The allegations have been adjudicated in this administrative proceeding, however. The Acting Director concludes that Respondent's misconduct demonstrating personal dishonesty was established by a preponderance of the evidence. The Acting Director also concludes that such misconduct could seriously prejudice the interests of Cross County's depositors. Accordingly, the sanction

of removal and prohibition is appropriately ordered here pursuant to 12 U.S.C. Sec 1464(d)(4)(A) (1982) and 12 U.S.C. Sec. 1818(e) (Supp. v 1993).

II. BACKGROUND

A. DESCRIPTION OF THE CHARGES AND SUMMARY OF ADMINISTRATIVE PROCEEDINGS

1. The Prior Suspension Order And Related Proceedings

Respondent was charged on August 8, 1990, with multiple counts of bribery. Cousin v. OTS, 840 F.Supp. 8, 9 (E.D.N.Y. 1993). On August 10, 1990, after the OTS learned of Respondent's arrest, the District Director of the New York District office of the OTS issued and served upon Respondent a Notice of Suspension and Prohibition from Participation in Association Affairs under 12 U.S.C. Sec. 1818(g)(1), suspending Respondent from his positions with Cross County and prohibiting him from further participation in any manner in the conduct of the affairs of Cross County. Id. On September 9, 1990, a grand jury indicted Respondent on eight counts of bribery and conspiracy. Id.

Pursuant to Respondent's request, an administrative hearing on the suspension was conducted on March 1, 1991. The President Officer subsequently issued a Recommended Decision that the Director continue the suspension and prohibition until final disposition of the criminal case. The Director of OTS adopted this recommendation on July 15, 1991. OTS AP 91-42.

On May 25, 1992, the criminal indictment was dismissed at Respondent's motion on the ground that he was not physically capable of standing trial. Cousin, 840 F.Supp. at 9. The OTS requested and obtained language in the dismissal order that the dismissal "does not constitute a final disposition of the indictment for purposes of 12 U.S.C. Sec. 1818(g), [and] is not a dismissal on the merits." Id. at 10. Respondent stated at the time that he had no objection to this provision. Id.

In February 1993, Respondent filed a civil action in federal district court for the Eastern District of New York against the OTS seeking a declaratory judgment that the OTS suspension order had been terminated as a matter of law by the district court's dismissal of the indictment. See Cousin v. Office of Thrift Supervision, Civ. No. 93-0548 (EHN). In dismissing Respondent's suit, the district court concluded that Respondent -- having negotiated the language of the dismissal -- waived his right to have the suspension order terminate when the criminal charges against him were dismissed.[1] Cousin, 840 F.Supp. at 11. Accordingly, the suspension order remains in effect.[2]

2. The Instant Proceeding

On May 13, 1993, Enforcement instituted the instant removal and prohibition proceeding against Respondent. The Notice of Charges alleges three incidents, under two independent counts, giving rise to the enforcement action. These three events also served as the basis for Respondent's arrest and criminal indictment in 1990. Count I charges that on two occasions in 1987 and 1988 Respondent bribed an IRS agent to terminate a grand jury investigation while on bank premises and using bank facilities. Count II charges that Respondent aided and abetted the crime of bribery, by disclosing confidential information

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[1] That action is presently on appeal before the U.S. Court of Appeals for the Second Circuit. Cousin v. OTS, Dkt. No. 94-6070 (argued September 14, 1994).

[2] The district court also noted that Respondent has recourse under 12 U.S.C. Sec. 1818(g) to apply to the OTS for reinstatement. 840 F.Supp. at 11. By letter dated September 30, 1992, Respondent requested, through counsel, acknowledgment by the OTS that the suspension order terminated by virtue of the dismissal. By letter dated November 25, 1992, the OTS notified Respondent that it considered the suspension order to continue in effect.

concerning the affairs of Cross County customers to an IRS agent in orchestrating a bribe of the agent by Cross County customers.

Respondent answered the charges on June 2, 1993, and asserted six affirmative defenses. Respondent also requested a private hearing. This request was opposed by Enforcement and denied by the Acting Director on August 6, 1993.

On July 18, 1993, Respondent moved to dismiss this proceeding. Enforcement opposed the motion and on August 9, 1993, the ALJ denied the request.

On September 13-15, 1993, a hearing was held in New York City, New York before the ALJ. At the hearing, Enforcement argued that Respondent also committed the additional offense of giving an illegal gratuity to a federal official in 1987. The parties filed post-hearing proposed findings of fact, conclusions of law, memoranda of law, briefs and reply briefs.

The ALJ issued a Recommended Decision and Order on March 31, 1994. Both parties filed exceptions thereto as well as additional memoranda and replies. On June 27, 1994, the parties were notified that the ALJ's Recommended Decision had been submitted to the Acting Director for final decision. On September 26, 1994, the Acting Director extended the deadline for issuing the final decision to October 11, 1994. OTS Order No. Ap 94-43.

B. Summary of the ALJ's Recommended Decision

The ALJ determined that Enforcement had not sustained its burden of proof under Count I for several reasons. First, he found that the evidence was insufficient to conclude that Respondent violated any law in 1987. Second, while he determined that Respondent's 1988 activity violated the anti-bribery statute, the ALJ concluded generally that Enforcement did not prove that the actual or potential loss or harm caused by Cousin's activities to the institution was "substantial", or that the interests of the depositors could be seriously prejudiced in light of the existence of federal deposit insurance. The ALJ also

concluded that Respondent's acts -- while evidencing personal dishonesty -- were not directed towards the Association. Nor did the ALJ find that Respondent acted with willful or continuing disregard for the safety or soundness of Cross County. Thus, the ALJ did not recommend removal or prohibition on Count I.

On Count II, however, the ALJ found against Respondent. The ALJ concluded that Respondent's involvement in the Cross County customers's bribe of an IRS agent constituted: a) a violation of law, per 18 U.S.C. Sec. 2 (treating aiders and abettors as principals); b) an unsafe and unsound banking practice; and c) a breach of fiduciary duty to Cross County. The ALJ also determined that the disclosure and misuse of confidential bank information was integrally related to Respondent's position at Cross County, and conclude that the Association suffered or will probably suffer substantial financial loss or other damage. Similarly, he concluded that Respondent's display of personal dishonesty was sufficient to warrant removal and prohibition because Respondent's misconduct related to activities concerned with the Association and that Respondent acted with willful and continuing disregard for the safety and soundness of the Association.

c. Exception to the Recommended Decision

Respondent has entered exceptions to most of the ALJ's Recommended Decision, reasserting arguments he raised before the ALJ. Respondent raises a number of factual exceptions, but the only significant one is his claim that he did not offer to pay the IRS agent to terminate the IRS investigation in 1988 or aid and abet the commission of bribery in 1988. Respondent also raises several evidentiary issues, summarized as follows: (1) that he was not permitted to adequately cross-examine witnesses on matters relating to the grand jury, IRS matters or his entrapment defense; (2) that certain discovery requests were improperly denied, including a request for issuance of a subpoena to the IRS; and (3) that OTS's expert testimony should not be accorded any deference. Finally, Respondent asserts a number of legal arguments, essentially denying that the elements for removal and/or prohibition have been met and claiming that Respondent

was entrapped and is the victim of government misconduct.

Enforcement excepted to the ALJ's Recommended Decision concerning Count I. First, Enforcement took exception to several factual issues relating to details concerning the bribes. Second, Enforcement excepted to the ALJ"s standard for removal and prohibition to the extent that the ALJ's interpreted each element to require Respondent's misconduct to be integrally related to the Association. Enforcement also argued that the ALJ, having failed to accord appropriate deference to the OTS's expert testimony, improperly concluded that there was insufficient evidence of actual or potential prejudice to the interests of the depositors.

III. FINDINGS OF FACT

The Acting Director generally accepts the facts relied on by the ALJ in his Recommended Decision. The Acting Director believes, however, that the record reflects additional facts relevant to a determination of this action. These facts are included in the following discussion of the three incidents giving rise to this proceeding.

A. The 1987 Bribe

The events underlying the bribery charge commenced in late 1986 or early 1987, when Kevin McLaughlin ("McLaughlin"), a Special Agent with the Internal Revenue Service ("IRS") Criminal Investigation Division, served a grand jury subpoena on European American Bank ("EAB") for records relating to Respondent. Respondent was contacted by EAB and thereafter initiated a meeting with McLaughlin in February 1987 to review documents at Cross County responsive to the EAB subpoena. When McLaughlin began to question Respondent about the documents, Respondent terminated the meeting on the grounds that he desired legal representation.

Several months later, Respondent called McLaughlin, complained of the cost of retaining an attorney and inquired whether it was necessary to do so. Respondent mentioned that

he donated a lot of money to charity, and offered to donate money to McLaughlin's favorite charity. Because McLaughlin believed that Respondent had offered him a bribe, he reported the incident to the U.S. Attorney's office and his supervisors, who directed him to enter into an undercover operation to accept any bribes offered by Respondent. All of Respondent's conversations with McLaughlin thereafter were monitored by means of a recording device.

On May 27, 1987, at Respondent's request, McLaughlin met with Respondent at Cross County. Respondent told McLaughlin that he did not need an attorney and that he would give McLaughlin half the money that it would have cost to retain an attorney. He also inquired whether McLaughlin "had a tape on" and later stated, "I hope you ain't taping it" and "you're not taping what we did," asking McLaughlin to raise his right hand to swear to it. (OTS Exhibit 1 at 6; 13).

On June 8, 1987, Respondent telephoned McLaughlin to schedule a meeting. McLaughlin asked if they "still got a deal" and Respondent replied, "of course." (OTS Exhibit 2 at 3). The next day, Respondent and McLaughlin met in Respondent's office at Cross County. During the meeting, Respondent inquired how McLaughlin knew his telephone weren't wiretapped. Respondent gave McLaughlin $1,750 in cash in an envelop and a Swiss silver bullion bar. When McLaughlin started to count the money, Respondent cautioned him to put it away.

B. The 1988 Bribe

In 1988, a grand jury subpoena was served on All Queens Tudor Realty ("AQTR"), located in Queens, New York, an entity in which Respondent had a financial interest. Within days after service of the subpoena, Respondent tried to contact McLaughlin.

On February 10, 1988 McLaughlin and Respondent, meeting at Cross County, discussed the subpoena issued to AQTR. McLaughlin understood that Respondent wanted the agent to "kill" the investigation of AQTR and "make the

subpoena go away" in return for $5,000 from Respondent and another party. (Transcript Vol. I at 96-97; OTS Exhibit 13). McLaughlin understood that Respondent would pay him $5,000 because Respondent used hand signals, indicated that figure and then wrote the amount on a piece of paper. Respondent and McLaughlin agreed to meet the following week to effectuate the payment to McLaughlin and later scheduled that meeting for February 18, 1988, at Cross County.

The meeting on February 18, took place in Respondent's office at Cross County. Respondent gave McLaughlin an envelope with $6,500[3] and repeatedly told McLaughlin he "wanted this stopped" and didn't "want to hear" anymore about the investigation (OTS Exhibit 5 at 9). McLaughlin understood from the discussion that Respondent wanted McLaughlin to "kill the investigation" and that Respondent "didn't want to be bothered with it anymore." (Transcript Vol. I at 101, 103, 105, 106, 108).

C. The Aiding and Abetting of a Bribe in 1988

In March of April 1988, Respondent -- on his own initiative -- contacted McLaughlin and scheduled a meeting on April 26, 1988. They met at Cross County and proceeded to a restaurant for lunch. During their meeting, Respondent suggested that McLaughlin open an investigation of certain Cross County customers for possible federal tax evasion and Respondent would arrange for the customers to bribe McLaughlin to close the investigation. According to Respondent's plan, Respondent would provide McLaughlin sufficient information on these individuals to enable McLaughlin to commence an investigation of them. Then, Respondent would arrange for the individuals to bribe McLaughlin to "kill" the case. (Transcript Vol. I at 109-10; OTS Exhibit 6). Respondent

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[3] Respondent originally told McLaughlin that Respondent was paying $5,000 and his partner in AQTR the remaining $1,500; however, Respondent later admitted to McLaughlin that it was all Respondent's money.

arranged for Max Fodera ("Fodera"), a friend of Respondent's and a member of the Cross County Board of Directors, to serve as an intermediary in Respondent's scheme. As part of his undercover operation, McLaughlin agreed to Respondent's plan.

At a meeting at Cross County on May 11, 1988 at Respondent's request, Respondent identified the individuals he mentioned on April 26, 1988, as a Mr. and Mrs. Parlante. John and Joan Parlante were borrowers who had obtained a mortgage from Cross County on their personal residences through Respondent. McLaughlin identified the information he would need about the Parlantes to open in investigation. Respondent thereafter provided McLaughlin with the Parlantes' social security numbers and information concerning the location of houses, business, and income as reported on their Cross County mortgage application.

In August 1988, McLaughlin served a grand jury subpoena on Cross County for the Parlantes' bank records, and McLaughlin and Respondent then discussed how they would proceed with the investigation of the Parlantes. McLaughlin testified that, during a meeting at Cross County, he and Respondent also considered "how to go about it, when to subpoena them, whether I should wait or do it sooner, do it later .. How we should proceed." (Transcript Vol. I at 128). Subsequent to this meeting, Respondent advised McLaughlin that Respondent believed the Parlantes would pay $425,000 bribe to McLaughlin.

Thereafter, at Respondent's direction, Fodera advised the Parlantes that Cross County had received a subpoena for the Parlantes' bank records. Fodera also told the Parlantes that they "were in a lot of trouble;" that Respondent wanted to talk with them; and that Respondent could "take care of everything." (Transcript Vol. II at 414). Following Fodera's meeting with the Parlantes, Respondent informed McLaughlin that the Parlantes were very concerned about the subpoena and Respondent advised McLaughlin that McLaughlin "will have some winner there." (OTS Exhibit 8 at 3, 8; Transcript Vol. I at 130).

Approximately one week later, Fodera advised the

Parlantes that Respondent wanted to talk with John Parlante at Cross County. John Parlante was not inclined to meet with Respondent but Mrs. Parlante agreed to meet with Respondent at Cross County. At that meeting, Respondent advised Mrs. Parlante that Cross County had been served with a subpoena and that the bank would have to give all the information Cross County maintained on the Parlantes to the IRS agent. Mrs. Parlante told Respondent that he should provide any information the IRS requested in the subpoena.

Respondent advised Mrs. Parlante that he had previous problems with the IRS, that the agent identified on the subpoena for the Parlantes' records was the same agent responsible for Respondent's case, and that Respondent "knew how to deal with this agent." (Transcript Vol. II at 382). Respondent further explained that the IRS agent would take a bribe and that "you have to bribe the agent." Id. Mrs. Parlante initially opposed any bribe plan and Respondent, disturbed with her resistance, told Fodera and Mrs. Parlante that he did not want to deal with her anymore and that he wanted to schedule a meeting with her husband at Cross County.

On September 26, 1988, Respondent and McLaughlin discussed when McLaughlin should serve the subpoenas on the Parlantes at their place of business. Respondent told McLaughlin that Respondent was dispatching Fodera to meet with the Parlantes the next day and that McLaughlin should delay serving the subpoenas until after Fodera met with them. Fodera was instructed to tell the Parlantes that Respondent knew McLaughlin. On the following day, Respondent telephoned McLaughlin and advised him that Fodera had met with the Parlantes and that Mrs. Parlante was concerned, but that her husband was not. McLaughlin and Respondent then agreed on the date and time that McLaughlin would serve the subpoena on the Parlantes.

As advised by Respondent and in furtherance of the plan conceived by Respondent, McLaughlin served a subpoena on the Parlantes at their place of business. John Parlante instructed McLaughlin to leave and to contact the Parlantes' lawyer. Mr.

Parlante then decided to meet with Respondent after his wife relayed Respondent's assertions that Respondent knew the agent and that "he could be taken case of." (Transcript Vol. II at 416).

John Parlante later met with Respondent at Cross County. During the meeting Respondent informed Mr. Parlante that Respondent knew McLaughlin from past investigations. Respondent also advised Mr. Parlante that McLaughlin would accept a bribe to terminate the IRS investigation of the Parlantes. Respondent encouraged Mr. Parlante to pay McLaughlin to terminate the investigation and gave Parlante specific instructions on how to effectuate the bribe, including use of a code phrase to signal that McLaughlin and Mr. Parlante could continue their discussions in private.

Respondent and McLaughlin thereafter spoke on the phone to discuss the subpoena involving the Parlantes and the possibility of payments from the Parlantes. Respondent also gave McLaughlin instructions on how to accept the payment from John Parlante, including instructions "to be careful what [he] said with him" and not to leave any evidence of a bribe amount on paper. (Transcript Vol. I at 146-148). On October 20, 1988, McLaughlin met with Mr. and Mrs. Parlante to discuss the IRS subpoenas. During the meeting, John Parlante, following Respondent's specific instructions, offered to pay McLaughlin $25,000 in cash to terminate the IRS investigation of the Parlantes. At the same meeting, Mr. Parlante paid McLaughlin $20,000 in cash. On October 27, 1988, Mr. Parlante paid McLaughlin an additional $5,000 in cash to terminate the IRS investigation.

Following the October 20, 1988, payment by the Parlantes, McLaughlin spoke by phone with Respondent on several occasions. Respondent was advised by McLaughlin of the payment by the Parlantes and encourage McLaughlin to ask the Parlantes for more money. He took credit for advising John Parlante how to effectuate the bribe, stating, "I coached him everything that he did to you today." (OTS Exhibit 12 at 14). Respondent also encouraged McLaughlin to pay Fodera $2,500 in cash for Fodera's role in obtaining the payment from the

Parlantes.

On November 2, 1988, McLaughlin telephoned Respondent and agreed to meet Respondent and Fodera. At the meeting, Respondent, Fodera and McLaughlin discussed the Parlante payment, and McLaughlin paid $2,500 to Fodera.

IV. ISSUES

This proceeding raises several issues, including: (1) whether the violation of a criminal statute may serve as the basis for a removal and prohibition order under 12 U.S.C. Sec. 1464(d)(4)(A) and if so, whether the evidence adduced in this action demonstrates a violation of law; (2) to what extent the "violation of law" provision in the removal and prohibition statute requires misconduct relating to the specific institution; and (3) whether the ALJ properly interpreted the phrase "that the interest of [the] savings account holders could be seriously prejudiced by reason of such violation . . . ," and properly evaluated Enforcement's evidence of potential or actual prejudice based on Respondent's 1990 arrest and indictment.

V. DISCUSSION

A. Statutory Background

The OTS's authority to bring this action against Respondent is founded on provisions existing both prior to the enactment of, as well as those included in, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P.L. No. 101-73, 103 Stat. 183 (1989).[4] The current version of the removal and prohibition statute appears in section 8(e) of the Federal Deposit Insurance act ("FDIA"), 12 U.S.C. Sec. 1818(e) (Supp. v. 1993). The remedies established by FIRREA may be applied to conduct that occurred before the

[4] The OTS is the "appropriate Federal banking agency" with regard to Cross County and Cousin. 12 U.S.C. Sec. Sec. 1813(q), 1818(I)(3).

statute was passed, but the substantive standards for judging Respondent's conduct are those found in the law in effect during the time of the conduct complained of, that is, former 12 U.S.C. Sec. 1464(d)(4)(A) (1982). See In re Keating, OTS order No. AP 91-20 (May 11, 1991) at 17-23; In re O'Keeffe, OTS order No. AP 90-661 (April 26, 1990) at 13-15.

Before turning to the analysis of the removal and prohibition charges at issue, the Acting Director notes that the statutory scheme for removal and prohibition involves additional provisions necessary for an understanding for this proceeding. The provisions appear in the enforcement statutes applicable to the agency existing both before and after the enactment of FIRREA.

Under section 8(g)(1)(A) of the FDIA, an institution-affiliated party charged with (1) a crime involving dishonesty or a breach of trust which is punishable by imprisonment for a term exceeding one year under state or federal law, or (2) a criminal violation of certain enumerated provisions of Titles 18 or 31 of the United States Code, may be summarily suspended and/or prohibited by the OTS if the agency determines that such individual's continued service or participation may pose a threat to the interests of the depositors or may threaten to impair public confidence in the association. 12 U.S.C. Sec. 1818(g)(1)(A).[5] Such suspension or prohibition remains in effect until the final disposition of the charge or until terminated by the agency. 12 U.S.C. Sec. 1818(g)(1)(B).

Similarly, if an institution-affiliated party is convicted of a crime involving dishonesty or a breach of trust which is punishable by imprisonment for a term exceeding one year under state or federal law, the OTS, upon a finding that continued service or participation by the individual may pose a threat to the

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[5] The institution-affiliated party may request a hearing after the issuance of the notice of suspension or prohibition. 12 U.S.C. Sec. 1818(g)(3)

interests of the association's depositors or may threaten to impair public confidence in the association, may issue without prior hearing, an order of removal or prohibition. 12 U.S.C. Sec. 1818(g)(1)(C)(i). In the event of a conviction for a violation of the enumerated provisions of Titles 18 and 31, the agency is required to order summarily the individual's removal or prohibition. 12 U.S.C. Sec. 1818(g)(1)(C)(ii).[6]

The statute also provides that the fact that an individual is found not guilty of the charge, or the charge is otherwise disposed of, does not preclude the OTS from thereafter instituting a proceeding seeking the individuals's permanent removal and prohibition under section 8(e) of the FDIA. 12 U.S.C. Sec. 1818(g)(1)(D)(ii).[7]

For conduct that occurred prior to the passage of the FIRREA, the OTS is authorized to issue a removal and prohibition order where an officer or director has, in pertinent part:

> (a) committed any violation of law or regulation; or
>
> (b) engaged or participated in an unsafe or unsound practice in connection with the institution; or
>
> (c) committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such officer or director.

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[6] The statute authorizes a post-order hearing at the request of the individual. 12 U.S.C. Sec. 1818(g)(3).

[7] Substantially similar provisions were in effect pre-FIRREA under 12 U.S.C. Sec. 1464(d)(5).

Second, as a result of such misconduct, the institution must either:

(a) have suffered or will probably suffer substantial financial loss or other damage, or

(b) the interests of its savings account holders could be seriously prejudiced by reason of the misconduct; or

(c) respondent received financial gain from the misconduct.

Finally, the misconduct must evidence either:

(a) personal dishonesty on the part of respondent; or

(b) a willful or continuing disregard for the safety or soundness of the institution.

12 U.S.C. Sec. 1464(d)(4)(A) (1982)(repealed).[8] The first

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[8] The current standard for removal and prohibition is set forth in 12 U.S.C. Sec. 1818(e). In most respects it is similar, although not identical, to the standard contained in sec. 1464(d)(4)(A).

Section 1818(e)(1) presently provides that the appropriate federal banking agency may serve a notice of removal/prohibition whenever it determines that any (I) institution-affiliated party has, directly or indirectly, (a) violated (1) any law or regulation; (2) any cease-and-desist order which has become final; (3) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or (4) any written agreement between such depository institution and such agency; (b) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or (c) committed or engaged in any act, omission, or

element identifies three independent types of misconduct, the latter two of which contemplate misconduct relating directly to the institution at issue. The second element identifies three alternative effects of the misconduct, including potential serious harm to the association. Finally, the last element identifies two separate aspects of culpability, the latter of which relates to the subject institution. These three categories of requirements may be referred to respectively as "misconduct," "effects" and culpability." See Oberstar v. FDIC, 987 F.2d 494, 500 (8th Cir. 1993) (construing substantially identical language in 12 U.S.C. Sec. 1818(e)).

B. Count I: Respondent's 1987 and 1988 Bribes of a Federal Official

1. Misconduct

a. The 1987 Conduct

i. The Bribery Charge

With regard to the first element, the underlying misconduct, Enforcement charged that Respondent twice bribed McLaughlin in 1987 and 1988 in violation of 18 U.S.C. Sec. 201(b)(1)(C). Section 201(b)(1)(C) imposes criminal penalties on whoever:

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practice which constitutes a breach of such party's fiduciary duty; (II) by reason of such violation, practice or breach, (a) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage; (b) the interests of the insured depository institution's depositors have been or could be prejudiced; or (c) such party has received financial gain or other benefit; and (III) such violation, practice or breach either involves personal dishonesty on the part of such party or demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution. 12 U.S.C. Sec. 1818(e)(1).

> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or person selected to be a public official to give anything of value to any other person or entity, with intent -- . . .
>
> (c) to induce such public official or such person selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; . . .

18 U.S.C. Sec. 201(b)(1)(C). See United States v. Gallo, 863 F.2d 185, 189 (2d Cir. 1988), cert. denied, 489 U.S. 1083 (1989) (bribery has been committed where something of value is offered or promised with intent to influence any official act). A bribe is distinguishable from an otherwise lawful expenditure to foster goodwill insofar as a bribe is made with "'criminal intent that the benefit be received by the official as a quid pro quo for some official act, pattern of acts, or agreement to act favorably to the donor when necessary.'" United States v. Head, 641 F.2d 174, 180 (4th Cir. 1981), quoting United States v. Arthur, 544 F.2d 730, 735 (4th Cir. 1976).

The element of criminal or "corrupt" intent that must be proved for a bribe is a higher degree of intent than that which is required under the provision that prohibits illegal gratuities. United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir.), cert. denied, 471 U.S. 1139 (1985), citing United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978).[9] A defendant's awareness of the illegality of the transaction is evidence of corrupt intent. Id.

The Acting Director rejects the ALJ's conclusion that the

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[9] Section V.B.1.a.ii infra discusses the lesser included offense of giving an "illegal gratuity."

evidence fails to establish that Respondent violated 18 U.S.C. Sec.201(b)(1)(c). While the evidence concerning the 1987 bribe is largely circumstantial, it is nonetheless clear that Respondent paid McLaughlin to terminate the IRS investigation in 1987. The evidence meets each of the four elements of a bribe -- (i) corruptly (ii) giving something of value (iii) to a government official (iv) to induce the official to act or omit to act in violation of his lawful duty. Respondent gave something of value -- $1,750 in cash, as well as a bar of silver bullion -- to McLaughlin, a government official.

Additionally, the evidence in the record, and Respondent's failure to rebut such evidence, also demonstrates that Respondent acted with the intent to induce McLaughlin to breach his lawful duty.[10] Respondent's statement to McLaughlin -- an IRS agent with whom he had no previous dealings -- that Respondent did not need an attorney and that he would give McLaughlin half the money that it would have cost

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[10] The evidence relating to the bribery charge is primarily based on McLaughlin's testimony and transcripts of the taped conversations between McLaughlin and Respondent. The ALJ found McLaughlin to be a credible witness. R.D. at 13 n.7. Given the ALJ's first-hand observations of the witness' demeanor, the Acting Director defers to the ALJ's determination.

Respondent failed to provide any witnesses on his own behalf, including himself. The Acting Director is entitled to draw an adverse inference from Respondent's failure to testify on his own behalf. See Director, Office of Thrift Supervision v. Lopez, 960 F.2d 958, 965 (11th Cir. 1992); N. Simms Organ & Co. v. Securities and Exchange Commission, 293 F.2d 78, 80-81 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962).

The Acting Director also notes that Respondent's repeated factual cites in his pleadings to the "totality of the evidence" is neither probative nor illuminating and fails to comport with the requirements of specificity set forth in 12 C.F.R. Sec. 509.39(b).

for an attorney, and his later affirmative response to McLaughlin's question whether they "still got a deal," admit of only one interpretation: Respondent wanted McLaughlin not to execute the subpoena, as McLaughlin's duty required him to do. The next day, Respondent gave an envelope full of money to McLaughlin. It was McLaughlin's uncontroverted testimony that he comprehended that Respondent's offer to donate money to McLaughlin's favorite charity (instead of retaining an attorney) was in exchange for abandoning the subpoena. Indeed, Respondent understood that he had offered McLaughlin a bribe, as he later admitted to John Parlante that he had previously bribed McLaughlin and advised John Parlante that "you have to" bribe the agent. (Transcript Vol. II at 417).

Further, Respondent's repeated efforts to conceal his communications with McLaughlin establish that he acted corruptly. Respondent was careful not to express the terms of the bribe more clearly, given his oft-stated concerns that the IRS might be surreptitiously recording his conversations with McLaughlin. Similarly, Respondent cautioned McLaughlin to not count the money in the envelope openly. Respondent's concerns and attempts to avoid surveillance demonstrate that he was aware of the illegal nature of his actions and was acting corruptly.

Respondent provides no creditable, alternative explanation of his behavior and the Acting Director is unable to discern one. The only apparent purpose was to obtain favorable treatment from McLaughlin in the course of the IRS investigation. Based on a preponderance of the evidence, the Acting Director concludes that Respondent believed he would not need an attorney because he would be able to successfully bribe McLaughlin; that the giving of money to McLaughlin was an effort to terminate the IRS inquiry; that the "deal" Respondent negotiated was the classic quid pro quo contemplated by section 201(b)(1)(C) and that Respondent acted corruptly.

The ALJ's statement that the evidence was insufficient to find a violation of law for the 1987 conduct appears to be based largely upon the weight he gave to the testimony of Ronald Fanelli ("Fanelli"), McLaughlin's supervisor. Fanelli testified that

he believed the evidence was "iffy" to support a criminal prosecution based on the bribery statute. Although it is unclear whether the ALJ was relying on Fanelli's legal or factual conclusions, or both, the ALJ's determination is flawed for several reasons.

First, the ALJ should not have relied on Fanelli's legal conclusions because, other than expert testimony, it is inappropriate to take evidence on the legal significance of particular facts. Here, Fanelli was not called to provide expert testimony on whether a criminal prosecution could be sustained against Respondent. Moreover, since Fanelli was discussing the possibility of criminal prosecution, the ALJ wrongfully applied the standard of proof required by a criminal proceeding -- beyond a reasonable doubt -- to a civil administrative action, which only requires a preponderance of the evidence.

Second, as a factual matter, Fanelli's individual opinion that the evidence was "iffy" to support a criminal bribery prosecution is wholly irrelevant because Respondent was in fact ultimately charged and indicted by a grand jury for bribery on these facts. Furthermore, Fanelli's opinion is not direct evidence of what transpired.

To the extent the ALJ's finding of insufficient evidence of a bribe in 1987 was based on evidence other than Fanelli's testimony, the Recommended Decision does not identify such evidence. Based on the Acting Director's independent review of the evidence, summarized above, he concludes that it was error for the ALJ to determine that no bribe had occurred, and that the evidence is compelling that Respondent bribed McLaughlin in 1987.

ii. The Illegal Gratuity Charge

The evidence also demonstrates that Respondent committed the additional offense of offering a federal official an

illegal gratuity in 1987.[11] Section 201(c)(1)(A) imposes criminal penalties on whoever:

> directly or indirectly gives, offers or promises anything of value to any public official, former public official or person selected to be a public official for or because of any official act performed or to be performed by such public official, former public official or person selected to be such public official.

18 U.S.C. Sec. 201(c)(1)(A). Unlike bribery, the crime does not require corrupt intent. United States v. Strand, 574 F.2d at 995.

The Acting Director concludes that Respondent violated section 201(c)(1)(A) as well. There are essentially three elements of the offense of giving an illegal gratuity: (i) the giving of something of value (ii) to a government official (iii) for or because of an official act. The first two elements are clear. It is undisputed that Respondent gave something of value -- $1750 in cash and the bar of silver bullion -- to McLaughlin, a government official.

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[11] Although not alleged in the Notice of Charges, at hearing Enforcement offered evidence that Respondent's conduct also violated the section of the statute prohibiting the giving of an illegal gratuity. Under 12 C.F.R. Sec. 509.20(b), the Notice is automatically amended to encompass the proof at hearing. Enforcement's alternative argument that if the misconduct in June 1987 did not constitute a bribe, it did constitute an illegal gratuity, was not challenged at the hearing. Rule 20(b) states "[w]hen issues not raised in the notice or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required." See Recommended Decision at 16 n.12. The ALJ correctly determined that the pleadings are deemed to conform to the proof offered at hearing.

All of the record evidence indicates that Respondent did so because of an official act McLaughlin was to perform -- execution of the subpoena. Prior to service of the EAB subpoena, McLaughlin and Respondent were not friends or even acquaintances. The interaction between Respondent and McLaughlin arose solely as a result of the IRS's investigation. After a handful of contacts -- all concerning Respondent's compliance with the investigation -- Respondent suddenly gave McLaughlin a substantial amount of cash. McLaughlin was not entitled to these gifts in the course of his duties as an IRS agent. The elements of an illegal gratuity have thus been proven. Again, based on his independent review of the evidence, the Acting Director concludes that it was error for the ALJ to determine that no illegal gratuity had been given, and that the evidence demonstrates that Respondent provided McLaughlin with an illegal gratuity.[12]

b. The 1988 Conduct

Respondent again violated the anti-bribery statute in 1988 in his attempts to circumvent the subpoena issued to AQTR. In a meeting at Cross County, Respondent gave McLaughlin an envelope with $6,500[13] and repeatedly told

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[12] The Acting Director rejects the ALJ's deference to Fanelli's testimony on this element as well, in light of the infirmities discussed above. Furthermore, Fanelli did not opine specifically on whether Respondent's conduct constituted the giving of an illegal gratuity, other than to indicate that in his opinion Respondent's conduct was more in the nature of an illegal gratuity than a bribe.

[13] Respondent originally told McLaughlin that Respondent was paying $5,000 and his partner in AQTR the remaining $1,500; however, Respondent later admitted to McLaughlin that it was all Respondent's money.

McLaughlin he "wanted this stopped" and "didn't want to hear anymore" about the investigation. McLaughlin understood from the discussion that Respondent wanted McLaughlin to "kill the investigation" and that Respondent "didn't want to be bothered with it anymore." It was McLaughlin's official duty to pursue the investigation and compliance with the subpoena.

Under the standards discussed above -- corruptly giving something of value to a government official to induce a violation of the official's duty -- the evidence demonstrates that Respondent gave McLaughlin $6,500 to terminate the investigation attendant to the AQTR subpoena. As Respondent did so, he took steps to communicate the proposed amount of the bribe in a concealed manner, that is, corruptly. From these facts, the Acting Director finds that Respondent violated 18 U.S.C. sec. 201(b)(1)(C).

The evidence also demonstrates that Respondent thereby committed the additional offense of giving an illegal gratuity to a government official. Respondent gave $6,500 to McLaughlin for the stated purpose of "stopping" the investigation. The Acting Director thus finds that Respondent violated 18 U.S.C. sec. 201(c)(1)(A) as well.

c. **Respondent's Defenses to the Violations of Law**

The Acting Director rejects Respondent's argument that the statute is intended to reach violations of banking law only, and that this case raises this as a question of first impression.

It is a well settled principle of statutory construction that the plain language of the statute controls its interpretation. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982). This statute provides expressly that removal and/or prohibition may be predicated in part on "any violation of law, rule or regulation..." 12 U.S.C. Sec. 1464(d)(4)(A) (emphasis added).[14] By its plain

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[14] The post-FIRREA version of section 1818(e) contains identical language; accordingly, this reasoning applies to the statute as amended by FIRREA as well.

language, the scope of this provision is not limited to violations of banking-related laws.[15]

Had Congress intended to so limit the reach of this provision to only certain types of offenses, it could have easily done so. Indeed, Congress had, prior to the enactment of FIRREA, provided for the prohibition of bank officials who had been convicted of crimes involving dishonesty or a breach of trust. See 12 U.S.C. Sec. 1464(d)(12)(B); 12 U.S.C. Sec. 1829 (1982)[16] Congress has since enumerated additional specific types of crimes that would subject an institution-affiliated party to suspension, removal or prohibition. See 12 U.S.C. Sec. 1818(e)(2). It is thus clear that when Congress wanted to limit particular suspension or removal provisions based on certain types of misconduct, it identified such misconduct specifically.

The Acting Director does not sit as a criminal tribunal competent to order criminal sanctions and here, no criminal penalties are sought or imposed. The OTS, however, is statutorily empowered to impose a remedy pursuant to Sec. 1464(d)(4) and Sec. 1818(e), which permit the Acting Director to order removal and/or prohibition based upon any violation of law, whether civil or criminal. Accordingly, the violation of a criminal statute -- albeit evaluated under civil standards for a civil remedy -- may serve as the basis for a removal and prohibition order under 12 U.S.C. Sec. 1464(d)(4)(A). See Van Dyke v. Board of

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15 As discussed below, of course, Respondent's violation of law could seriously prejudice the interests of Cross County's depositors and thus satisfies the "effects" test of section 1464(d)(4)(A).

16 The first statutory provision applied solely to savings and loans; the latter applied to banks. See also 12 U.S.C. Sec. 1464(d)(4)(C)(suspension or removal/prohibition for violations of the Depository Institutions Management Interlocks Act).

Governors of the Federal Reserve System, 876 F.2d 1377 (8th Cir. 1989)(bank president removed under 12 U.S.C. Sec. 1818(e)(1) based on check kiting violation under 18 U.S.C. Sec. 1344).[17]

The Acting Director also rejects Respondent's claim that he was entrapped into committing bribery. A valid entrapment defense contemplates: (1) inducement by law enforcement officers and (2) lack of predisposition by the defendant to commit the crime. See e.g., Matthews v. United States, 485 U.S. 58, 63 (1988). Respondent has not established either element here.

While the government may use undercover operations to enforce the law, it may not "originate a criminal design, implant in an innocent person's mind the disposition to commit the act, and then induce the commission of the crime so the government may prosecute." See Jacobson v. United States, ___ U.S. ___, 112 S.Ct. 1535, 118 L.Ed.2d 174, 184 (1992). The record is clear that the idea to bribe McLaughlin originated with Respondent, not with McLaughlin. Here, the chain of events was commenced by the proper issuance of a subpoena. It was Respondent's improper response to that subpoena, i.e., the bribe overture to McLaughlin, that caused the IRS to conduct the undercover operation. As part of such operation, McLaughlin agreed to Respondent's plan. McLaughlin did not initially solicit, propose, initiate, broach or suggest that he would be amenable to accepting a bribe. See United States v. Dunn, 779 F.2d 157, 158 (2d Cir. 1985). The record does not reflect that Respondent lacked predisposition, or was induced by McLaughlin, to commit

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[17] The Acting Director's findings do not expose Respondent to additional criminal liability. Clearly, the Acting Director's findings herein could not be used against Respondent in a criminal proceeding because of the different standards of proof. See e.g., United States v. Konovsky, 202 F.2d 721 (9th Cir. 1953).

In any event, the statute of limitations has apparently expired on most if not all of the criminal claims filed against Respondent. Cousin, 840 F.Supp. at 11.

the crime as the entire bribery scheme was caused by his design and overtures.

Finally, Respondent claims that he was the victim of outrageous government conduct. Having considered the submissions of the parties and the ALJ's Recommended Decision on this point, the Acting Director dismisses this claim as baseless.

2. Effects of Respondent's Misconduct on the Association

The ALJ found generally that Enforcement did not prove the "effects" requirement because he concluded the testimony of Michael Simone ("Simone"), an Assistant Director in the OTS Northeast Region, was insufficient to show that the actual or potential harm caused by Respondent's activities to the institution was "substantial."[18] Although it is unclear whether the ALJ was focusing on financial loss or other harm, the record reflects sufficient evidence that by virtue of Respondent's attempted bribes, the interests of the depositors could be seriously prejudiced.

An interpretation of this provision must commence with the plain language of the statute. See American Tobacco Co., 456 U.S. at 68. This prong of the second element requires that the "interests of [the depositors] could be seriously prejudiced.: 12 U.S.C. sec. 1464(d)(4)(A)(emphasis added).[19] Congress, by

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[18] The Acting Director notes that the ALJ did not fail to credit Simone's testimony, nor did he find it outweighed by other witnesses' testimony. Accordingly, in assessing Simone's testimony, the Acting Director believes it is a straightforward matter to compare the testimony and the supporting evidence to the appropriate legal standard.

[19] The corresponding post-FIRREA statute reads: "the interests of the depositors have been or could be prejudiced." 12 U.S.C. Sec. 1818(e)(1)(B).

including the word "could," clearly intended that the statute reach not only immediate but also potential harm. As the Federal Deposit Insurance Corporation ("FDIC") noted in the context of a proceeding to uphold a suspension order:

> Were it otherwise, the [FDIC] would have to wait until loss or damage to a bank or its depositors had occurred, or confidence had been impaired, and would not be able to act to prevent such loss or damage, or impairment of confidence. Such would be ineffective regulation and was not the intention of Congress.

In re Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1 (bound) para 5027 (Prentice Hall). Accord Van Dyke v. Board of Gov. of the Fed. Reserve, 876 F.2d at 1377 (banking agencies are not powerless to respond to official's illegal activity until actual harm to institution occurs). Cf. Saratoga Savings and Loan v. Federal Home Loan Bank Board, 879 F.2d 689, 693 (9th Cir. 1989)(cease-and-desist provision of statute was intended to authorize federal Banking agencies to curtail abuses before they harm institution).

The removal and prohibition provision does not identify specifically what constitutes "serious prejudice" to the interests of the depositors. As a matter of statutory interpretation, "serious prejudice" must contemplate something in addition to "substantial financial loss or other damage"[20] or the second element of this provision would be redundant. Such an interpretation is inconsistent with the principle that statutes should be read to give meaning to each independent statutory provision. See, e.g., United States v. Nordic Village, ___ U.S. ___, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992).

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[20] This alternative element of the "effects" test appears in Sec. 1464(d)(4)(A). Section 1818(e) is identical except it omits the word "substantial."

The Acting Director notes that the FDIC has indicated that "serious prejudice" to the interests of the depositors may be caused by inter alia, engaging in conduct that harms the reputation of the institution, causing loss of confidence to depositors, among others. See In re James G. Welk, FDIC Docket No. 91-201e (October 13, 1992), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1, para 5186 (Prentice Hall). The Acting Director similarly concludes that Congress, intending this section to have broad coverage, drafted the phrase to include conduct whose consequences, even if not immediate, could seriously harm the financial institution or its depositors. That is, conduct that injures the reputation of the institution or that otherwise would persuade a depositor that his or her funds were subject to a substantial risk is conduct within the "serious prejudice" standard, even if an immediate dollar effect cannot be quantified.

Enforcement's evidence satisfies this standard in two respects. First, Simone's testimony established that Respondent's conduct harmed the institution's reputation, with the potential for serious risk to the interests of the depositors. OTS officials, such as Simone, possess the requisite expertise and familiarity with the thrift industry to make such predictive judgments. See Franklin Savings Ass'n v. Director, Office of Thrift Supervision, 934 F.2d 1127, 1146 (10th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1475 (1992).[21]

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21 "Administrative agencies are afforded wide deference in predicting the likelihood of future events." Michigan Pub. Power Agency v. Federal Energy Regulatory Comm'n, 963 F.2d 1574, 1580 (D.C. Cir. 1992). Evidence reflecting the basis for the OTS's predictive judgment concerning the potential for harm to the Association is entitled to weight as a matter particularly within the expertise of the agency.

The Acting Director finds Respondent's citation to United States v. Sette, 334 F.2d 267 (2d Cir. 1964) inapposite, as Sette involved expert testimony by the same agents who conducted the investigation; was rendered prior to the adoption of the Federal Rules of Evidence; and did not involve an

Here, the misconduct involved bribery, which arose as an illegal response to a legitimate law enforcement inquiry. Simone testified that serious charges like bribery against a bank officer have a significant impact on public confidence in financial institutions, and that depositors have concerns about leaving money in an institution where questions have been raised regarding that institution's management -- particularly where, as here, Respondent committed the unlawful conduct on the Association's premises. A loss in public confidence could result in a run on the institution and losses to the association and ultimately to the deposit insurance fund. As the FDIC has noted:

> Ordinary bank customers and the general public must be able to view a bank's vice president and director as a trustworthy person without doubt or uncertainty. Where charges of dishonesty and the submission of false statements involving money have been preferred [sic] by a Grand Jury against a bank official there is an obvious potential for doubt and uncertainty. Such may impair public confidence and damage a bank. It is not too much to require that a bank's officers and directors be above suspicion.

In re Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1, para.5027 (Prentice Hall). Moreover, as Simone testified, criminal conduct by banking officials damages the public's perception of the integrity of the entire banking system, because customers tend to relate what happens at one institution to all other types of institutions.

Second, Respondent's illegal conduct damages the bank official's credibility with its regulator and interferes with the federal regulatory process, with the consequence that no depositor can be confident that his or her deposits enjoy the safeguards the regulatory system provides. (Transcript Vol. II at

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adjudicatory proceeding such as this.

487). The need for honest and accurate communications between a thrift and its regulator is paramount to the proper operation of the industry. See 12 C.F.R. Sec. 563.180(b); OTS Statement Concerning the Responsibilities of Directors and Officers of Insured Depository Institutions, reprinted in Federal Guide, para 36,485 (November 18, 1992) [hereinafter "Statement of Directors and Officers Responsibilities"]. Effective communication is seriously jeopardized by the efforts of an association's chief executive officers to obstruct a lawful government inquiry. In this case, the evidence is compelling that Respondent intended to do exactly that. In the Acting Director's judgment, Respondent's interference with a lawful IRS investigation could destroy whatever confidence depositors might have that Respondent would communicate with regulators with the requisite candor. Their deposits would be subject to a substantially greater risk than at an institution where the management cooperated with government oversight. This prejudice to the interests of the depositors is underscored where, as here, Respondent was directly running the Association and illegal activities attributed to him could have a significant impact on Cross County.[22] Thus, the interests of Cross County's depositors could be seriously prejudiced by Respondent's wrongful acts.

Accordingly, the Acting Director concludes that the ALJ erred when he found the Enforcement had not met the "effects" test for Count I. Simone's testimony was sufficient to show that the potential effect of Respondent's unlawful conduct could seriously prejudice the depositors' interests. Additionally, it is clear to the Acting Director that an officer and director who undertakes to impede a government investigation erodes the confidence that depositors are entitled to have in the institution, and threatens the kind of honest and accurate communications that regulators require.

The presence or absence of demonstrable significant loss is not dispositive since this element also encompasses potential

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[22] Respondent himself contended that "Cross County is the lengthened shadow of Michael Cousin." Answer at pg. 4.

serious harm. In fact, where the statutory scheme is operating most efficiently, wrongdoers may be removed before they cause losses to the association and the federal insurance fund. Here Respondent was suspended before his misconduct was permitted to cause an immediate financial loss to the Association, on the grounds that the attendant loss of public confidence in the management of Cross County would, if left unremedied, ultimately result in detriment to the institution and to some extent the industry as a whole.

There is some evidence that significant loss would have resulted from Respondent's misconduct. During the period 198-1992, the Association had generally experienced an increase in assets and deposits. During the period June-December 1990, which includes the time when Respondent was arrested and suspended in August 1990, Cross County experienced a decline in assets in the amount of $900,000 and a decline in deposits in the amount of $350,000. (Transcript Vol. III at 685-686). Respondent presented no evidence to rebut the inference that this sudden decline was due to the publicity surrounding the charges lodge against Respondent. It was reasonable to expect that had Respondent not been suspended at that point, the deterioration of public confidence in the Association would have been more severe and the withdrawals could have been significant. The fact that the statutory scheme was effective in this instance, i.e., that it prevented substantial financial loss or other damage to the Association by the immediate suspension of Respondent, does not counsel permitting Respondent to continue his association with the institution.

The ALJ erroneously concluded that "serious prejudice" to the interests of depositor could not be demonstrated in light of the existence of federal deposit insurance, which is intended to protect deposits up to a designated amount in the event the institution becomes insolvent. Federal deposit insurance, however, existed in 1966 when Congress amended section 1464 to include removal and/or prohibition authority. Following the ALJ's logic, "serious prejudice" to the interests of the depositors could thus never be proven. Surely the statute should not be interpreted to render the amendment meaningless. See Montana

States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249-50 (1985). Accordingly, the Acting Director concludes that the existence of deposit insurance does not eliminate the possibility of "serious prejudice."

The Acting Director rejects the argument that the "effects" test requires more immediate or direct impact upon the association than establishment of the possibility of serious prejudice to the interests of the institution's depositors. Congress simply did not draft section 1464 to impose such a requirement.

Moreover -- and contrary to Respondent's assertions -- bank officials who have engaged in illegal activities not directed at the association with which they were employed have been relieved of their responsibilities under analogous statutory provisions. See, e.g., In re Anonymous, FDIC Docket No. FDIC-84-86g (July 30, 1984), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1 para 5027 (Prentice Hall)(suspension order based on criminal indictment for personal income tax evasion); Van Dyke, 876 F.2d 1377 (removal and prohibition order based on official's participation in criminal check kiting scheme involving his and another institution).

3. Respondent's Culpability

The Acting Director also concludes that Respondent's illegal conduct involves "personal dishonesty." Personal dishonesty encompasses a broad range of conduct, including "disposition to lie, cheat[,] or defraud; untrustworthiness; lack of integrity; . . . misrepresentation of facts and deliberate deception by pretense and stealth[;]. . . [or] want of fairness and [straightforwardness]." Van Dyke, 876 F.2d at 1379. See also Financial Institutions Supervisory and Insurance Act of 1966: Hearing on S.3158 and S.3695 Before the Committee on Banking and Currency, House of Representatives, 89th Cong., 2d Sess. 53 (1966) (statement of Chairman Horne and Kenneth E. Scott, General Counsel of the Federal Home Loan Bank Board)("personal dishonesty" encompasses primarily, but not exclusively, conduct actionable under state and federal criminal statutes).

Bribery of a government official demonstrates, among other things, a lack of integrity. As discussed above, banking officials are placed in a position of trust and responsibility over the finances and affairs of their depositors and customers. Respondent's attempts to illegally thwart a law enforcement investigation demonstrate untrustworthiness and a want of integrity. See Van Dyke, 876 F.2d 1377. The Acting Director concludes that such activity evidences "personal dishonesty" under 12 U.S.C. sec. 1464(d)(4)(A).

The ALJ concluded that the "personal dishonesty" element must be related to activities concerning the association, and determined that in this case it was not. The ALJ erred in concluding that the statutory requirement of "personal dishonesty" was not met here. His requirement that the misconduct must evidence personal dishonesty towards the association is not founded in the statute. While the latter prong of this element (as well as other aspects of the removal and prohibition statute) contemplates misconduct directed at the association,[23] the former does not. The Acting Director defers to the plain language of sec. 1464(d)(4)(A) and interprets "personal dishonesty" as not limited to conduct directed at the association.

C. Count II: Respondent's Aiding and Abetting the Bribery of a Federal Official

The Acting Director affirms the ALJ's conclusions concerning Respondent's liability under Count II. Because, however, the ALJ's analysis regarding the second and third elements of the removal/prohibition analysis imposes standards not required by the statute, the Acting Director does not adopt his analysis.

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[23] The alternative prong focuses on a "willful or continuing disregard for the safety or soundness" of the institution. 12 U.S.C. Sec. 1464(d)(4)(A).

1. Misconduct

The Acting Director finds that Respondent is culpable on each independent section of the misconduct element.

A. Respondent violated the law

Respondent violated the law by aiding and abetting the Parlante bribe of McLaughlin. Under 18 U.S.C. Sec. 2(a), "[w]hoever commits and offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Liability as an aider and abettor will lie where one has associated himself with a criminal venture, participated in the venture, and sought by his action to make the venture succeed. See United States v. Menesses, 962 F.2d 420, 427 (5th Cir. 1992), citing Nye & Nissen v. United States, 336 U.S. 613 (1949); United States v. Teffera, 985 F.2d 1082, 1086 (D.C. Cir. 1993).

The record demonstrates that John Parlante gave McLaughlin $25,000 in cash to stop the IRS investigation. John Parlante testified that he has pled guilty to a charge of bribery, and Fodera pled guilty to aiding and abetting the bribery of a public official. The Acting Director concludes that the evidence established that John Parlante committed bribery of McLaughlin and that Respondent aided and abetted the Parlantes' bribe. It was Respondent who suggested the plan whereby the Parlantes would bribe McLaughlin. Respondent gave McLaughlin confidential information concerning the Parlantes. Respondent arranged for Fodera to serve as an intermediary in the bribery scheme. Respondent plotted with McLaughlin on numerous occasions "how to go about it, when to subpoena them, whether I should wait or do it sooner, do it later ...how we should proceed." (Transcript Vol. 1 at 128). Respondent advised Joan Parlante to offer a bribe to McLaughlin. Respondent instructed John Parlante on how to offer a bribe and instructed McLaughlin on how to accept it. Respondent encouraged McLaughlin to ask the Parlantes for more money and encourage McLaughlin to pay Fodera $2,500 in cash for Fodera's role in the bribery scheme.

The record reflects that Respondent conceived and

developed the bribery scheme. Afterwards, he was an active participant in its execution and worked diligently toward its success. While it is unclear precisely what motivated Respondent to perpetrate his illegal scheme, it is clear that Respondent was not motivated by a patriotic desire to report suspected income tax evasion because it would not have been necessary to commit a crime merely in order to report one. Nor did Respondent notify the Association or the OTS of his suspicions. The record shows that Respondent's purpose in providing confidential customer information to McLaughlin was to facilitate a bribery scheme. The Acting Director thus finds that substantial evidence demonstrates that Respondent committed a violation of law within the meaning of 12 U.S.C. sec. 1464(d)(4)(A).

b. Respondent's Defenses to the Violations of Law

For the reasons discussed above, the Acting Director rejects Respondent's argument that the statute does not reach criminal violations of non-banking laws; that this case raises a question of first impression; and that Respondent was entrapped, and was the victim of government misconduct.

c. Respondent Committed an Unsafe or Unsound Banking Practice

Respondent's actions also constitute an unsafe or unsound practice. An unsafe or unsound practice is understood to have:

> a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action with is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continue would be loss or damage to an institution, its shareholders, or the agencies administering the insurance fund.

Financial Institutions Supervisory Act of 1966: Hearings on S.3158 Before the House Committee on Banking and Currency,

89th Cong., 2d Sess. at 49-50 (1966)(statement of Chairman Horne), cited in First National Bank of Eden v. Dept. of Treasury, 568 F.2d 610, 611 (8th Cir. 1978). See also In the Matter of Lopez and Saldise, OTS Order No. Ap 94-23 at 29 n.47 (May 17, 1994)(appeal pending); In the matter of Keating, OTS Order No. AP 93-85 at 34-35 (October 22, 1993)(appeal pending).

The evidence in this proceeding establishes that Respondent abused his official position at Cross County to obtain and improperly disclose confidential information from Cross County's files on the Parlantes, exposing the Association to abnormal risk of loss or damage.[24] It is reasonable to expect that bank customers will cease to conduct business with an association that improperly publicizes confidential customers data. As discussed above, withdrawal of deposits may cause a run on the association which could in turn endanger the federal deposit insurance fund. By his misconduct, Respondent put the interests of the depositors and the insurance fund at risk.

Indeed, Congress enacted a statute with the express purpose of protecting the confidentiality of bank customers. See Right to Financial Privacy Act, 12 U.S.C. Sec.Sec. 3401 et seq. ("RFPA"). The RFPA permits release of personal financial records to the federal government only in accordance with its terms. Generally, the RFPA requires that customers notice be given when a federal agency solicits an individual's records from a financial institution.[25] Respondent disregarded the

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[24] As with the "effects" test, it is significant that Congress did not require proof of actual loss but rather intended the statute to address the risk of, or potential for, loss.

[25] The RFPA further requires such individuals to be given opportunity to oppose the government's request for information. There are a number of enumerated exceptions to these requirements, including disclosure pursuant to a subpoena or court order respecting grand jury proceedings, 12 U.S.C. Sec. 3413(i), or an administrative subpoena issued by an administrative

requirements of RFPA in providing the Parlantes' financial information to McLaughlin. Respondent's disclosure does not fall within the exceptions identified in the statute. Respondent did not provide the information to McLaughlin in April 1988 in response to an administrative subpoena, search warrant or judicial subpoena. Nor did Respondent provide the information pursuant to a lawful investigation directed at Cross County. Moreover, the Parlantes neither consented to nor authorized the disclosure of such information Consequently, the Acting Director accepts the conclusion of the ALJ that the violation of a law designed to protect bank customers is an unsafe or unsound practice.

The evidence on Count II also establishes that it was Respondent, the chief executive officer of the institution, who hatched the complicated bribery scheme and who drew Fodera, a director, and the Parlantes, bank customers, into it. The instigation of an unlawful scheme by the head of an insured institution and his efforts to involve another director and bank customers is exceptionally imprudent. The weaknesses in management that such conduct reveals poses an abundant risk of loss to the institution. For this reason as well, the Acting Director concludes that Respondent committed an unsafe or unsound practice.

Repeated violations of law constitute an unsafe or unsound banking practice. See, e.g., In the Matter of Ronald J.Grubb, FDIC Docket Nos. FDIC-88-282k and FDIC-89-11e (August 25, 1992), reprinted in FDIC Enforcement Decisions and Orders, Vol. 1 para 5181 (Prentice Hall). Here, Respondent's misconduct escalated over time in 1987 and 1988, culminating in the Parlantes' bribe. Respondent's misuse of his official position and his disregard for the proper use of bank information also violated prudent standards of operation and were unsafe and unsound. Furthermore, Respondent -- who essentially controlled Cross County -- endangered the institution by placing his personal interests before the interests of the depositors. By his

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law judge. 12 U.S.C. Sec. 3413(f).

misconduct, Respondent put the interests of the depositors and the insurance fund at risk. The Acting Director thus concludes that Respondent's activities under Count II constituted an unsafe or unsound banking practice.

d. Respondent Breached his Fiduciary Duties to the Association

Officers and directors of an insured depository institution owe fiduciary duties to that association. See, e.g., Bowerman v. Hamner, 250 U.S. 504, 510 (1919); Briggs v. Spaulding, 141 U.S. 132, 146, 152 (1891); Brickner v. Federal Dep. Ins. Corp., 747 F.2d 1198, 1202 (8th Cir. 1984); In re Neil Bush, OTS Order No. AP 91-16 (April 18, 1991). Officers and directors of thrifts must discharge duties owed to depositors, shareholders and creditors of the institutions they serve, and comply with federal and state statute, rules and regulations. Statement of Directors and Officers Responsibilities at para. 36,485.

Respondent's fiduciary duties include the duty of loyalty and duty of care. Id. The duty of care requires officers and directors to act as prudent and diligent business persons in conducting the affairs of insured institutions. Id. Respondent violated his fiduciary duty of care by ignoring the interests of depositors when he illegally disclosed confidential information to further a bribery scheme, drew a director and customers into his scheme and committed unlawful acts.

The duty of loyalty requires officers and directors to administer the affairs of the institution with candor, personal honesty and integrity. Id. Respondent violated his duty of loyalty because the entire bribery arrangement with McLaughlin was "set up so that [Respondent] would benefit, for whatever reason he thought was necessary, at the expense of the institution, and that expenses being the business of the institution going forward." (Transcript Vol. II at 501). Respondent endangered the institution by placing his personal interests in the success of his illegal scheme before the interests of the depositors.

Accordingly, the Acting Director concludes that

Respondent committed violations of law, engaged in an unsafe or unsound practice and breached his fiduciary duties to Cross County by orchestrating and participating in a scheme to bribe a government official.

2. Effects of Respondent's Misconduct on the Association

The ALJ also determined that the disclosure and misuse of confidential bank information was integrally related to Respondent's position at Cross County, and concluded that the Association suffered or will probably suffer substantial financial loss or other damage. The Acting Director does not reach this prong because the alternative prong, contemplating the possibility of "serious prejudice" to the interests of the depositors, has been met here.[26]

The adverse effects upon Cross County resulting from Respondent's misuses of bank records to orchestrate a bribery scheme are even more detrimental than those effects accruing from the conduct charged under Count I. Here, the misconduct involved use of confidential customer information to orchestrate and assist the commission of criminal activity. In addition, Respondent encouraged another member of Cross County's Board of Directors to engage in such activity.

Depositors are entitled to trust the management of depository institutions to spend their time in the office furthering the interests of the association, not committing illegal acts. The Acting Director finds that by virtue of Respondent's misconduct, the interests of Cross County depositors could be seriously prejudiced.

3. Respondent's Culpability

The Acting Director accepts the conclusion of the ALJ

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[26] The ALJ did not make findings or conclusions under the "serious prejudice" standard on Count II.

that Respondent's aiding and abetting of a bribe involves "personal dishonesty." Here, Respondent believed that he had successfully bribed McLaughlin twice. Emboldened by his apparent success, Respondent concocted the scheme whereby the Parlantes would bribe McLaughlin. Orchestration of a scheme to bribe a government official demonstrates, among other things, a lack of integrity. Moreover, Respondent lied to Cross County customers about the circumstances surrounding the IRS subpoena and counseled Fodera, a Board member, to not only lie to the Parlantes as well, but also to accept part of the bribe. As discussed above, banking officials are placed in a position of trust and responsibility over the finances of their depositors and customers. Respondent has demonstrated untrustworthiness and a want of integrity in abusing his official position and violating the RFPA as part of a large illegal scheme to engineer a bribe by Cross County customers. See Van Dyke, 876 F.2d 1377. The Acting Director concludes that such activity evidences "personal dishonesty" under 12 U.S.C. Sec. 1464(d)(4)(A).

The ALJ concluded that Respondent's activities demonstrated "personal dishonesty." He construed the statute, however, to require a demonstration of personal dishonesty directed towards the Association. As discussed above, this requirement is not founded in the statute.

The ALJ also found that Respondent demonstrated a willful and continuing disregard for the safety and soundness of Cross County because he ignored the proper affairs of the institution in pursuing his own illegal objectives and, as a result, exposed Cross County to serious risks that could threaten the safety and soundness of the institution. Based on the record, the Acting Director concludes that Respondent's orchestration of the Parlantes' bribe was intentional and continued over a period of months -- furthering the misconduct that Respondent commenced in 1987. Therefore, the evidence also supports a finding of willful and continuing disregard for the safety and soundness of Cross County. The Acting Director finds that each alternative prong of the culpability element of 12 U.S.C. Sec. 1464(d)(4)(A) has been met for Count II.

D. Respondent's Remaining Exceptions

Respondent has asserted various discovery and evidentiary exceptions, as well as exceptions raised earlier by means of affirmative defenses. Having carefully considered the rulings of the ALJ and the submissions of the parties, the Acting Director rejects these exceptions.

All other exceptions lodged by the parties and not otherwise addressed herein are denied.

E. Respondent's Request for Oral Argument

In Respondent's May 10, 1994 cover letter transmitting his exceptions, he requests oral argument before the Acting Director pursuant to 12 C.F.R. Sec. 509.40(b). Enforcement opposes this request. Under Rule 40(b) of the Rules of Practice and Procedure, the Director has the discretion to order and hear oral argument.

A party seeking oral argument, however, has the burden of demonstrating good cause for such argument and establishing that arguments cannot be adequately presented in writing. Upon consideration of Respondent's request for oral argument, the Acting Director finds that: (1) the factual and legal arguments are fully set forth in the parties' written submission; (2) the Acting Director will not be aided in deciding this matter by oral argument; (3) Respondent will not be prejudiced by the lack of oral argument; and (4) Respondent has not shown good cause for oral argument. Therefore, the Acting Director declines to exercise his discretion under Rule 40(b) and denies Respondent's request for oral argument.

VI. CONCLUSION

Based on the record with regard to Count I, the Acting Director finds that Respondent: (i) committed violations of law in bribing an agent of the IRS in 1987 and 1988; (ii) as a result of these violations, the interests of the Association's depositors could be seriously prejudiced; (iii) such violations evidence

personal dishonesty. Based on the record with regard to Count II, the Acting Director finds that Respondent: (i) committed a violation of law in aiding and abetting and additional bribe of an IRS agent in 1988, breached his fiduciary duty to the Association and committed unsafe or unsound banking practices by disclosing confidential customer information; (ii) as a result of this misconduct, the interests of the Association's depositors could be seriously prejudiced; and (iii) such misconduct evidenced personal dishonesty and willful and continuing disregard for the safety and soundness of the Association. Accordingly, the Acting Director issues herein a final order removing Respondent from his former positions with Cross County and prohibiting further participation by Respondent in any manner in the conduct of the affairs of any insured depository institution.

ORDER

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge, the exceptions and replies to exceptions filed by the parties, and for the reasons set forth in the accompanying Decision:

The Acting Director, pursuant to his authority under Section 5(d)(1)(A) of the Home Owners' Loan Act, 12 U.S.C. Sec. 1464(d)(1)(A)(Supp. v 1993), and Section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. Sec. 1818(e)(Supp. v. 1993), and former Section 1464(d)(4) of the Home Owners' Loan Act of 1933, 12 U.S.C. Sec. 1464(d)(4)(1982), finds that Michael Cousin ("Cousin" or "Respondent"), in his former capacity as the Chief Executive Officer and Chairman of the Board of Directors of Cross County Federal Savings Bank, Queens, New York ("Cross County"), a federal savings association, was an institution-affiliated party participating in the conduct of the affairs of Cross County who violated laws, engaged in unsafe or unsound practices in connection with Cross County and committed acts and practices which constitute breaches of his fiduciary duty as a director and officer, and as a result of Cousin's violations, unsafe or unsound practices, and breaches of fiduciary duty, the interests of Cross County's depositors could be seriously prejudiced.

These violations, unsafe or unsound practices, and breaches of fiduciary duty involved personal dishonesty on the part of Cousin and demonstrate willful and continuing disregard for the safety and soundness of Cross County. Accordingly, grounds exist to issue an order removing Cousin from office and prohibiting Cousin from any further participation in the conduct of the affairs of Cross County and the other institutions and entities listed in 12 U.S.C. Sec. 1818(e)(7).

Respondent filed, pursuant to 12 C.F.R. Sec. 40(b), a request for oral argument before the Acting Director. Upon consideration of Respondent's request for oral argument, the Acting Director finds that: (1) the factual and legal arguments are fully set forth in the parties' written submissions; (2) the Acting Director will not be aided in deciding this matter by oral argument; (3) Respondent will not be prejudiced by the lack of oral argument; and (4) Respondent has not established good cause for oral argument.

IT IS THEREFORE HEREBY ORDERED:

1. Cousin is removed from office and prohibited from further participation in any manner, in the conduct of the affairs of Cross County pursuant to 12 U.S.C. sec. 1818(e);

2. While this Order is in effect, Cousin may not continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of, any institution or entity listed in 12 U.S.C. sec. 1818(e)(7)(A);

3. Conduct prohibited by this Order includes the conduct specified under 12 U.S.C. sec. 1818(e)(6);

4. This Order is subject to the provisions of 12 U.S.C. sec. 1818(j);

5. The provisions of this Order are effective upon the expiration of thirty (30) days after the date of service of this Order upon Cousin and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions

of this Order shall have been stayed, modified, terminated, or set aside by action of the Acting Director or a reviewing court, or in accordance with 12 U.S.C. sec. 1818(e)(7)(B). Respondent is hereby notified that he has the right to appeal this Decision and Order within thirty (30 days) after service of such Decision and Order under 12 U.S.C. sec. 1818(h);

6. Respondent's request for oral argument is denied; and

7. The Order Continuing Suspension and Prohibition issued against Cousin, pursuant to 12 U.S.C. sec. 1818(g), on July 15, 1991 (OTS AP 91-42), will continue until the effective date of this Order, at which time the Order Continuing Suspension and Prohibition shall terminate.

DATED: October 11, 1994

THE OFFICE OF THRIFT SUPERVISION

By: /s/
Jonathan L. Fichter
Acting Director

UNITED STATES OF AMERICA
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

IN THE MATTER OF

Docket No.
OTS-AP-93-38

MICHAEL COUSIN, a Person
Participating in the Conduct of
the Affairs Bank, MIDDLE VILLAGE,
QUEENS, NEW YORK

RECOMMENDED DECISION
OF REMOVAL AND PROHIBITION

APPEARANCES:

On Behalf of the Office of Thrift Supervision:

Richard Shapiro, Esq.
Lance Cassak, Esq.
Jersey City, New Jersey

On Behalf of Respondent:

Ramsey Clark, Esq.
Lawrence W. Schilling, Esq.
New York, New York

BEFORE:

Walter J. Alprin
Administrative Law Judge
Office of Financial Institution
Adjudication
Washington, D.C.

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I. PROCEDURAL HISTORY AND RECOMMENDATION

On May 13, 1993, to continue an Order of Suspension previously imposed, the Office of Thrift Supervision ("OTS") filed and served a Notice of Charges initiating a Removal and Prohibition action against Respondent Michael Cousin ("Cousin" or "Respondent"), a Direct and Chief Executive Officer of Cross County Federal Savings Bank ("Cross County" or "Bank"), of Middle Village, Queens, New York, pursuant to its authority under 12 U.S.C. §1464(d)(4)(1982), hereinafter referred to as such section number without date of enactment, or as the "pre-FIRREA statute," superseded by §1818(e). On June 2, 1993, Respondent filed an answer to the Notice.

The Notice cites three incidents which give rise to this action. First, in Charge I, the Notice alleges that in 1987, Respondent bribed an Internal Revenue Service ("IRS") Agent in an attempt to terminate a grand jury investigation. Second, also in Charge I, Respondent is charged with bribing the same IRS Agent in the winter of 1988, in an attempt to unlawfully quash a grand jury document subpoena on a real estate entity in which Respondent had a financial interest. Third, in Charge II, Respondent is charged with disclosing to the same IRS Agent confidential financial information in the spring of 1988, regarding two bank customers for the purposes of arranging a bribe to that Agent.

Respondent alleges three main affirmative defenses -- first, that he was entrapped by the agent; second, that government misconduct during the bribery investigation vitiated the charge; and third, the OTS initiated the charges as a means to continue harassment of the Respondent.

On August 6, 1993, the Acting Director of OTS denied Respondent's request for a private hearing. On August 9, 1993, the undersigned denied Respondent's Motion to Dismiss the proceeding. A public administrative hearing was held on the Notice of Charges from September 13 through 15, 1993, inclusive, in New York, New York.

This Recommended Decision will hold that as to Charge I, Enforcement Counsel have submitted a preponderance of evidence that Respondent engaged in the second misconduct alleged, but not the effect and culpability statutorily required for removal and prohibition; that as to Charge II, Enforcement Counsel have submitted a preponderance of evidence that Respondent engaged in the misconduct alleged, which resulted in the effect and from the culpability statutorily requiring that Respondent be removed and prohibited from further participation in the affairs of federally insured financial institutions; and finally, presenting the Acting Director a with a recommendation for an Order of such relief.

II. FINDINGS OF FACT

A. JURISDICTION AND PARTIES

1. Respondent was Chairman of the Board of Directors and Chief Executive Officer of Cross County from approximately January 20, 1958, until August 14, 1990. (Answer para. 9.)[1] He maintained an office at Cross County in his official capacity as chairman and CEO (Answer para. 11). At all times relevant to the events set forth in the Notice of Charges, Respondent was a director and officer within the meaning of 12 U.S.C. §1464(d)(A).

2. At all times relevant to this action, Cross County was a federally-chartered savings and loan association or federal savings bank whose deposits were subject to federal deposit insurance. (Answer §10).

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[1] Citations to the record of this proceeding shall be as follows:

Answer to Notice: Answer para. _____
Exhibits: OTS Ex. ___ or R.Ex. _____
Hearing Transcript: TR. _____

3. As of August 9, 1989, pursuant to Section 3(g) of the Federal Deposit Insurance Act ("FDIA"), as amended 12 U.S.C. Sec. 1813(g), the OTS succeeded to the interests of Federal Home Loan Bank Board ("FHLBB") as regulatory agency with respect to the supervision and regulation of all savings associations. Accordingly, OTS is the appropriate Federal banking agency with regard to Cross County and persons participating in the conduct of the affairs of the Bank.

B. 1987 BRIBERY CHARGE

4. In 1986, IRS Special Agent Kevin McLaughlin ("McLaughlin") served a grand jury subpoena on European American Bank ("EAB"), another financial institution located in Middle Village, New York, requesting records relating to Respondent. The purpose of the subpoena was to obtain records from EAB to ascertain whether there was any information regarding subjects of a pending grand jury investigation, in which Respondent was neither a target nor a subject. (TR 180-181, 183, 196, 213.)

5. Respondent contacted McLaughlin in January of 1987, because he understood it was McLaughlin who had served the subpoena. Respondent claimed he could save the government money by showing McLaughlin the documents sought in the subpoena without having EAB produce the material. (TR 61.) Respondent arranged a meeting at the Bank for McLaughlin to review the documents.

6. On May 27, 1987, Respondent and McLaughlin met at Respondent's office in the Bank. Respondent said that he made many charitable contributions of money, and he then offered to contribute money to McLaughlin's favorite charity. (TR 63-64.)

7. McLaughlin met with his superiors at the IRS and advised them that he believed Respondent had offered him a bribe. McLaughlin's superiors directed him to enter into an undercover relationship with Respondent and to accept any bribe

offered. (TR 64-65.)

8. On June 9, 1987, in a meeting at Bank, Respondent paid McLaughlin $1,750 in cash and gave him a Swiss silver bullion bar. (TR 86-87.)

C. 1988 BRIBERY CHARGE

9. On February 5, 1988, an IRS representative served a grand jury subpoena duces tecum on All Queens Tudor Realty, Inc. ("All Queens"), which was located in Queens, New York. (TR 87) At the time the subpoena was served, Respondent purportedly had an undisclosed financial interest in All Queens. One of the reasons for serving the subpoena was to see how Respondent would react. (TR 555.)

10. On February 10, 1988, McLaughlin met with Respondent in his office at the Bank. During this meeting, Respondent asked McLaughlin to unlawfully quash the subpoena. (TR 96-97: OTS Ex. 13.) Respondent offered to pay the agent to terminate the IRS investigation of All Queens Tudor Realty. (TR 96-98).

11. On February 18, 1988, in Respondent's office at Bank, Respondent gave McLaughlin $6,500. (TR 100; OTS Ex. 5, at 9).

D. DISCLOSURE OF CONFIDENTIAL INFORMATION

12. On April 26, 1988, during a meeting between Respondent and McLaughlin in Respondent's automobile on the way to a local restaurant, and during lunch, Respondent suggested that he "could give [McLaughlin] some information on some individuals, that I could open up a case, and then he could arrange for them to pay me money to kill that case that I had opened up." Without providing the names of the persons, Respondent "said they were bad people, and that if we looked into them and opened an investigation, we could probably find something, and then he'd be able to arrange [for] them to pay me

money to kill the investigation." (TR 109-110). Respondent also suggested that Max Fodera, a member of the Board of Directors at Bank, would be willing to act as an intermediary in arranging a payoff from the bank customers to McLaughlin to terminate any IRS investigation of such customers. (TR 114).

13. On May 11. 1988, at the Bank, Respondent asked McLaughlin what information he would need for the above scheme, had the Parlantes' Bank files delivered to himself, and told McLaughlin the social security numbers, business names, location of houses and business, and salaries, of bank customers Joan and John Parlante as reported on their mortgage application. (TR 116-118). Respondent disclosed that the Parlantes held two $475,000 mortgages at the Bank, that they made their monthly mortgage payments in cash, and that the couple under-reported their incomes on federal tax returns.

14. At the time the information was revealed to McLaughlin, neither of the Parlantes had given their consent for the disclosure of their dealings with the Bank, and no one from Cross County had ever advised the Parlantes that the Bank disclosed confidential information to the government regarding them. (TR 379, 413-4).

15. On August 15, 1988, as suggested by Respondent, McLaughlin served a grand jury subpoena on Respondent at the Bank for the Parlantes' bank records. (TR 128).

16. Mrs. Parlante told Respondent that he should provide any information requested in the subpoena. (TR 381). Respondent concealed from Mrs. Parlante that he had already disclosed the information to McLaughin. Respondent advised her that McLaughlin could be bribed, and when she resisted this suggestion, Respondent said he would not deal with her in the future and that he would meet with her husband instead. (TR 382).

17. On September 24, 1988, the Parlantes were personally served with grand jury subpoenas which requested,

inter alia, the books and records of Cobra Gun Skin, and Lite-Tek International, two separate businesses owned by the Parlantes.

18. Respondent met with John Parlante ("Parlante") in his office at the Bank to discuss the IRS investigation of the Parlantes. Respondent advised Parlante that McLaughlin would accept a bribe to terminate the investigation, and then proceeded to instruct him in how to offer the bribe. (TR 614-17). During October of 1988, Respondent advised McLaughlin on how to negotiate and accept payments from the Parlantes. On October 20, 1988, McLaughlin met with Parlante to discuss the IRS subpoenas. At this time, Parlante offered to provides McLaughlin with free gun holsters from their business, but eventually agreed to pay $25,000 in cash to terminate the IRS investigation. McLaughlin received $20,000 in cash from Parlante, and one week later received the additional $5,000 in cash.

19. Respondent told McLaughlin that Max Fodera should receive at least $2,500 as a fee or commission for having assisted in the bribery. (TR 157-58).

E. SUSPENSION

20. Respondent was arrested in August 1990. On August 10, 1990, the Director of the New York District office of OTS, pursuant to 12 U.S.C. §1818(g)(1), recommended Respondent's suspension from office. After an internal informal hearing not within the jurisdiction of the Administrative Procedure Act, the OTS' Director issued a Notice of Suspension of Respondent, as an institution-affiliated party charged with a felony, from participation in the affairs of a financial institution, effectively suspending Respondent from his position with Cross County. (OTS Ex. 9)

21. On May 25, 1992, the criminal indictment against Respondent was dismissed due to Respondent's ill health. The dismissal specified that it had no effect on administrative

proceedings, and the OTS Suspension Order remains in effect.

III. ADDITIONAL FACTS AND DISCUSSION OF LAW

A. STATUTORY OVERVIEW

OTS initiated this action for conduct that occurred in 1987 and 1988, pursuant to its authority under Section 5(d)(1)(A) of the Home Owners' Loan Act of 1933 ("HOLA"), 12 U.S.C. §1464(d)(1)(A), as amended by Section 301 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") (Pub.L.No. 101-73, 101 Stat. 183 (August 9, 1989)), and the pre-FIRREA version of Section 5(d)(4) of the HOLA (12 U.S.C. §1464(d)(4)), and Section 8(e) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1818(e). Banking regulatory agencies are authorized to remove officers and directors from an insured bank and to prohibit their future participation in the affairs of a federally insured financial institution. Pursuant to §1464(d)(4) covering conduct prior to 1989 and pre-FIRREA, a removal and/or a prohibition order can be issued whenever there is a finding that an officer or director has:

(A) violated a law or regulation, or engaged or participated in an unsafe or unsound banking practice or breached his fiduciary duties as a director or officer with respect to that bank;

and

(B) as a result of the violation, practice or breach, the institution has suffered or will suffer substantial financial loss or other damage or the interests of the institutions's depositors have been or could be seriously prejudiced or the director or officer has received financial gain from the misconduct;

and

(C) the misconduct evidence personal dishonesty on

> the part of the director or officer or demonstrates a willful or continuing disregard for the safety and soundness of the institution.

Accordingly, in order to impose the removal or prohibition, the OTS must establish each of the following three criteria; "misconduct," the "effect" of such misconduct, and the "culpability" of Respondent.[2]

B. COUNT I

The first count of the notice focuses on Respondent's two alleged bribes of McLaughlin in 1987 and in 1988. The first issue is whether Respondent's misconduct entails a violation of law.

1. Violation of Law

The charges allege that Respondent violated a statute, Title 18 of the United States Code, dealing with criminal acts, by bribing McLaughlin. Respondent disputes the application of this charge to the pre-FIRREA 12 U.S.C. §1464(d)(4)(A), currently 12 U.S.C. §1818(e)(1), arguing that to support prohibition from further participation in the affairs of a federally insured institution, the "statute" allegedly violated must specifically relate to federally insured institutions. There is no reported decision or other authority to support such an argument. However, it is believed by the undersigned that the specific terms of the pre and post-FIRREA prohibition statutes make clear that they refer to violation of any law by reason of which an "insured depository institution or business institution has suffered or will probably suffer financial loss or other damage," or "the interests of the insured depository institution's depositors have been or could be prejudiced," 12 U.S.C. §1464(d)(4)(A), 12 U.S.C. §1818(e)(1). See, also, 12 U.S.C. §1818(g)(1) as to suspension for the mere indictment, even prior to conviction, of having committed any felony. Thus the universe of statutes and violations applicable is

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[2] Oberstar v. FDIC, 987 F.2d 494 (8th Cir. 1993).

limited to those not necessarily specifically referring, but having a specific nexus to direct repercussions in banking depository institutions.

OTS charges that Respondent twice bribed McLaughlin in violation of 18 U.S.C. §201(b)(1)(c). The statute provides in pertinent part that a person is guilty of bribery if he or she:

> (1) directly or indirectly, corruptly giver, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent-
>
> * * *
>
> (c) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

Thus, bribery has been defined as the voluntary giving or receiving of anything of value in corrupt payment for an official act completed or to be completed. (12 Am Jur 2d §3). A bribe requires the intent to influence an official in the performance of his or her duties, and entails a corrupt intent and an offer of something of value to influence the action or non-action.[3]

A showing of a corrupt intent is a requirement of the violation. "Congress enacted [18 U.S.C.] §201(b) to provide a broad deterrent against attempted corruption of public officials by means of bribes. The focus of this section is upon the briber's intent to corrupt, not upon prevention per se, of the briber's ultimate ends, or upon the bribed individual's ability to effect a

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[3] United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir. 1985), cert. denied, 471 U.S. 1139, 105 S.Ct. 2684 (1988).

result."[4] In short, "[p]roof of bribery requires proof that the payer acted corruptly with the intent of influencing any official act, influencing a public official to defraud the government, or to do or omit an act in violation of his official duties."[5] There must be specific intent to induce a public official to act in a particular way.[6]

a) Discussion of 1987 Bribery Charge

McLaughlin is the primary government witness to testify about the alleged bribes in 1987.[7] In late 1986, McLaughlin served a grand jury subpoena on European American Bank for records of Respondent's account.[8] After Respondent received

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[4] United States v. Gjieli, 717 F.2d 968, 976 (6th Cir. 1983), cert. denied, 465 U.S. 1101.

[5] United States v. Muldoon, 931 F.2d 282, 287 (4th Cir. 1991).

[6] United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965), cert. denied, 383 U.S. 967, 86 S.Ct. 1272 (1966); United States v. Kim, 738 F.Supp. 1002, 1003 (E.D.Va. 1990).

[7] Respondent attempted to discredit the credibility of McLaughlin's testimony throughout. The inconsistencies in McLaughlin's testimony, however, were few in number immaterial to the issues herein, and insufficient to counter the undersigned's observance of the witness' demeanor in testifying, which was considered overall as straightforward and truthful.

[8] At the administrative hearing, witnesses and counsel were careful not to reveal details of the ongoing investigation so as to preserve its confidentiality. The specific nature of the criminal case is unknown to the undersigned and is not necessary to prove the requisite elements in the administrative matter.

notice of the subpoena from EAB, he contacted McLaughlin and offered to "save the government money" by showing him the records in his possession at Cross County rather than having EAB produce the documents. McLaughlin then met Respondent, for the first time, in February 1987, at Cross County.

In spite of having initiated the meeting, Respondent refused to answer any questions without the presence of an attorney. In April 1987, the second contact between the two men occurred. Respondent telephoned McLaughlin and asked whether it was necessary to obtain an attorney since it was expensive to do so. (TR. 63). McLaughlin testified that he did not tell Respondent that he should not obtain counsel, but the evidence suggests that he did indicate to Respondent, directly or indirectly, that he did not need counsel. (TR. 221-224).

At this meeting, Respondent told McLaughlin that he often gave charitable contributions of money and "he could even give to my favorite charity." (TR. 63). McLaughlin understood the remark to be intended as an overture to a bribe and advised his superiors and the U.S. Attorney's Office of the conversation. (TR. 65). After meeting with his superiors, it was decided that future conversations with Respondent would be surreptitiously recorded.[9]

On May 27, 1987, McLaughlin and Respondent met in a conference room at the Bank to discuss the grand jury subpoena to EAB and they later went to lunch together. McLaughlin

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[9] The transcripts of recorded conversations between Agent McLaughlin and Respondent have been redacted pursuant to an agreement by the government and criminal defense counsel. (TR 74). OTS Enforcement Counsel represented that "the agreement was that only certain transcripts would be introduced at (the criminal) trial, and those transcripts would be reacted to remove information regarding other individuals." (TR 75).

testified that twice that day,[10] Respondent offered to pay the agent half of $3,500, the money "saved" in not obtaining an attorney to monitor the sessions in which he would respond to McLaughlin's direct questions. (TR. 79-80). On June 9, 1987, in another meeting with both men at the Bank, Respondent gave McLaughlin $1,750 in cash, and a Swiss silver bullion bar. The facts of this incident are not in dispute.[11] The question is whether the act was a bribe or a gratuity, and the answer hinges on Respondent's intent.

Consideration of the circumstances of the transaction will be of assistance. McLaughlin first met Respondent on the Bank's premises to review documents sought in response to a grand jury subpoena. The subpoena was directed at another bank, EAB, seeking Respondent's bank account records relating to an ongoing investigation involving other individuals. Respondent was not the target of the investigation and the subpoena was not served on him. However, the solicitation by Respondent to provide McLaughlin with the information from his own files, rather than having the subpoena responded to by EAB, in addition to the payment of money and silver, is evidence that Respondent was attempting to have McLaughlin "do or omit to do" an act "in violation of (McLaughlin's) lawful duty" to execute the subpoena and obtain information from EAB, and thus constituted a bribe to a public official.

The testimony of Agent Ronald Fanelli of the Internal Security Division of the Internal Revenue Service, however, was to the contrary. He was responsible for monitoring the taped conversations between Respondent and McLaughlin and the debriefings afterwards. Agent Fanelli has investigated about 80 to 100 cases, and has the experience to determine when there is sufficient evidence to refer a matter for criminal prosecution.

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[10] The first instance is not clear on the audio tape recording.

[11] Respondent did not present any witnesses at hearing to deny the charges.

Agent Fanelli testified that "[b]ased on the facts, as they had been related to me, Mr. Cousin's initial payment fell more in the area of a gratuity; and that, if I recall specifically, he did not ask McLaughlin to do anything. And therefore, going ahead with a prosecution on a bribe, under those circumstances, would be very iffy, at best, if in fact it was only a gratuity." (TR. 284-285). In view of this testimony, the undersigned finds that there is not a preponderance of evidence proving an intent of Respondent's to offer a bribe to a public official.

b) Illegal Gratuity Under §201(c)(1)(A)

OTS argues in the alternative that even if the above-mentioned facts do not give rise to a bribe under 18 U.S.C. §201(b)(1)(c), Respondent still is guilty of an illegal gratuity in violation of 18 U.S.C. §201(c)(1)(A). Therefore, OTS Enforcement counsel asserts that a "violation of law", one of three alternative requirements for the misconduct prong of the removal and prohibition standard, has still been met whether characterized as a bribe or an illegal gratuity.[12]

Section 201(c)(1)(A) states in pertinent part that:

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[12] OTS enforcement counsel maintain that since Respondent did not challenge the government's alternative argument of "illegal gratuity" at hearing, pursuant to applicable rules governing the proceeding the Notice is automatically amended to encompass the proof at hearing. The Rules of Practice and Procedure applicable to this proceeding, cited directly above, "Amendments to conform to the evidence," provides that "when issues not raised in the notice are tried at the hearing by the express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice or answer, and no formal amendments are required." Though some may consider such rule to be inequitable, the undersigned, and the parties, are bound by it. Accordingly, the Notice is automatically amended to include OTS' alternative argument of "illegal gratuity."

> Whoever... directly or indirectly gives, offers, or promises anything of value to any public official..., for or because of any official act performed or to be performed by such public official...shall be fined under this title or imprisoned...

The standard for proving violations of a bribe and an illegal gratuity are the same with the important exception that no proof of a corrupt intent is necessary for an illegal gratuity.[13] While Agent Fanelli did not specifically apply his expertise to the issue an unlawful gratuity, he did indicate he would not have considered the payment to be prosecutable under the circumstances, and the undersigned will defer to his expertise.

The record is thus insufficient to support a finding that Respondent "violated a law" under 12 U.S.C. §1464(d)(4) with respect to the portion of Charge I relating to the 1987 incident. The next chronological issue is whether Respondent violated a law with respect to the 1988 bribery charge.

c. **Discussion of 1988 Bribery Charge**

In the first week of February 1988, an IRS Agent other than McLaughlin served a grand jury subpoena on All Queens Tudor Realty ("All Queens") in Queens, New York. At the time the subpoena was served, the IRS knew that Respondent had a financial interest in the entity.

Within a week after service of the subpoena, Respondent telephone McLaughlin, who returned Respondent's call. McLaughlin used a pay phone to call Respondent at Cross County. During the ensuing conversation, Respondent implied that since the subpoena had been issued from McLaughlin's office at the IRS he might know the Agent who served the

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[13] United States v. Kim, 738 F.Supp. 1002, 1003 (1990) and United States v. Strand, 574 F.2d 993, 995 (9th Cir. 1978).

subpoena, and the McLaughlin might be able to help Respondent and his associate[14] at All Queens with the subpoena. (OTS Ex. 4 at 8 - end). During this conversation, McLaughlin pointedly asked Respondent whether he could get something in return for helping. (OTS Ex. at 14). Respondent told McLaughlin that he should know better than to even have to ask, implying that the agent would be compensated for his efforts. Inconsistent with the clandestine tone of the conversation is Respondent's repeated assertions that the investigation would not reveal any wrongdoing because none occurred. (OTS Ex. 4 at 11, 13 and 18). Respondent then arranged for a meeting in person to discuss the new subpoena. (TR. 90-92).

On February 10, 1988, McLaughlin met Respondent in the conference room in Cross County to discuss the subpoena served on All Queens. (TR. 95-96). It was agreed that McLaughlin would try to terminate the grand jury subpoena in return for money. On February 18, 1988, McLaughlin and Respondent met at Bank. At this meeting, Respondent handed McLaughlin an envelope containing $6,500 in cash. (TR. 100-103; OTS Exh. 5 at 9-12). Pursuant to earlier conversations, the source of the money was to have been from both Respondent and his associate at All Queens, but Respondent admitted that all the money came from him. (TR 100). During this conversation and after the exchange of money, Respondent repeatedly told McLaughlin that he wanted the investigation of All Queens to stop. (TR. Vol. I at 103-104, 106 and 109).

In this instance, unlike in the 1987 alleged bribery incident discussed above, there is clear evidentiary support for a charge of bribery. The elements of a corrupt payment to a public

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[14] The associate's name is not mentioned in the record but the person manages the All Queens business. It is clear from the transcripts of the recorded conversations that Respondent is worried about the strain of the grand jury subpoena on this person, who had recently been released form the hospital. (OTS Ex. 4).

official to do or fail to do an act in violation of the official's duty, are all present. Respondent paid McLaughlin $6,500 in cash in exchange for having the agent terminate the grand jury subpoena served on All Queens. Accordingly, Respondent bribed McLaughlin in violation of 18 U.S.C. §201(b)(1)(c).

d. Entrapment Defense

Respondent does not dispute that he paid McLaughlin $6,500 but argues that he was induced or entrapped into doing so. Entrapment is an affirmative defense which excuses a defendant from criminal liability for crimes induced by agent or police conduct.[15]

Entrapment has been defined as the inducement of one to commit a crime not contemplated for the purpose of instituting a criminal prosecution. (21 Am Jur 2d §202). The defense consists of two elements -- inducement by law enforcement officers, and the lack of predisposition by the defendant to commit the violation.[16] A person who would not have committed the violation but for the actions or inducements of the law enforcement officer has been entrapped. However, where law enforcement officers merely afford an opportunity for a person to violate the law, and the offender acts of his or her own volition, no entrapment has occurred. Predisposition is defined as a "defendant's inclination to engage in the illegal activity for which he has been charged, i.e. that he is ready and willing to

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[15] The undersigned did not analyze the entrapment defense with respect to the 1987 bribery charge since the record did not support a finding of a violation. The asserted defense was therefore moot and needed no comment. Unlike the 1987 incident, the 1988 bribery charge is supported by the evidence and an analysis of the defense is necessary.

[16] Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 886 (1988); United States v. Fadel, 844 F.2d 1425 (10th Cir. 1988).

commit the crime."[17]

In the case at hand, Respondent was Chairman of the Board and Chief Executive Officer of Cross County until August 14, 1990, for more than thirty years. There is no evidence of previous offers by Respondent to bribe an official, or evidence of any criminal wrongdoing by Respondent whatsoever prior to the incident in 1987 already discussed.

Respondent argues that the IRS did not have a legitimate purpose in serving the grand jury subpoena on All Queens other than to solicit the service of Respondent as informer regarding an ongoing criminal case targeting other individuals. The purpose of this second subpoena is not fully explored in the record, but regardless of the purpose, the record clearly indicates that it was Respondent who contacted McLaughlin in regard to engaging in unlawful act, and not McLaughlin who contacted Respondent. At worst, issuing and serving the subpoena alone would be no more than offering an opportunity to Respondent, and is insufficient to constitute inducing Respondent to offer a bribe.[18] While McLaughlin did ask in the preliminary telephone conversation whether there was "something in it" for him, the Respondent answered that McLaughlin should have known that such a question was not necessary, evidencing that Respondent needed no inducement and was fully predispositioned to commit bribery.

McLaughlin repeatedly testified that he did not initiate telephone conversations with Respondent during their relationship but instead waited for Respondent to contact him, or returned Respondent's calls. (TR. 117) Although attempts were

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[17] United States v. Ortiz, 804 F.2d 1161, 1165 (10th Cir. 1986).

[18] The All Queens subpoena was not served by McLaughlin nor was McLaughlin's name mentioned on the subpoena.

made on cross-examination to impeach the agent with respect to who initiated the telephone calls, the effort was not successful. (TR. 169-172). The record indicates that Respondent initiated virtually all of the telephone calls and meetings with the agent. Accordingly, Respondent acted on his own volition and was not induced by McLaughlin.

Respondent also claims outrageous government misconduct in the wire surveillance by McLaughlin and in the conduct of the government during the investigation. Though as dictum in United States v. Russell, 411 U.S. 423, 431-32 (1973), the Court stated that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction..., a defendant seeking dismissal of an indictment on this basis must establish that the police conduct is shocking to the universal sense of justice."[19] There is no evidence to support Respondent's assertion of outrageous government misconduct. In virtually all instances, telephone contacts were initiated by Respondent either directly reaching McLaughlin, or leaving a message for McLaughlin to return the call.

For purposes of the removal and prohibition standard in this case, 12 U.S.C. §1464(d)(4), it is here determined that Respondent "violated a law."

2. Effects

Respondent's misconduct with respect to Count I of the Notice, his violation of a criminal statue by bribery must have a proscribed effect ont he institution in order to meet the prohibition and removal standard. OTS must prove that as a result of Respondent's misconduct the institution "has suffered or

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[19] United States v. Fadel, 844 F.2d 1425, 1429 FN3, (10th Cir. 1988) and cases cited therein.

probably will suffer substantial[20] financial loss or other damages" to the institution, or may seriously prejudice the interests of its depositors.

Michael Simone, Assistant Director II of the OTS Northeastern Region, testified regarding the harm to the institution. In his view, news of Respondent's indictment for bribery undermined public confidence in Cross County, and further, had a significant impact on the financial integrity of the entire banking system. (TR. 485). The loss to the institution may come when borrowers go to other institutions to finance their loans as a result of the loss of public confidence and then Cross County loses business and money. (TR. 488). Since Respondent was so integrally involved in the daily affairs of the institution, Simone believes that any negative reflection on Respondent is also a negative reflection on Cross County. (TR. 493).

There is no evidence of actual substantial loss to the institution, then present or in the future, as a direct result of charges alleged in Count I of the Notice. Assistant Director Simone questioned the ability of customers to trust Respondent in his official capacity after his dishonest conduct, suggesting that customers might believe that if Respondent would bribe an IRS agent[21] he might be expected to also offer a bribe to an OTS

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[20] Only the pre-FIRREA statute, and not the post-FIRREA statute, includes the word "substantial." Since we are dealing with the pre-FIRREA statute, however, the loss or damage must be "substantial."

[21] Respondent's criminal charge of bribery was dismissed due to his ill health and accordingly, no finding of guilt was ever made.

examiner[22] (TR. 487) or fail to make necessary entries in the institution's books and records to reflect losses. If Respondent's actions effected the health of the institution and caused its demise, then the savings account holders could stand to loose their funds as a result. (TR. 489).

While the undersigned recognizes the deference given by case law to the predictive abilities of bank examiners and other regulatory officers, they are not bound by them if the predictions or their testimony does not have an adequate basis. Considering the nature of the Federal Deposit Insurance Fund, the undersigned would not accept that the interests of depositors might be substantially damaged, though he does agree that the institution might well be subject to some, and not substantial, financial loss or other damage.

Under the pre-FIRREA standard for prohibition and removal, the criterion that applies here, it is required that the association have suffered or may suffer substantial loss.[23] The record does not support a finding of risk of substantial loss or harm to the institution or the savings account holders. The record shows insufficient basis for believing that the incidents detailed in Count I, not related to Respondent's official capacity at the Bank, might cause a mass exodus of bank customers or a loss of future customers. The underlying facts of those incidents involved grand jury subpoenas served on entities other than Cross County and sought documents that did not relate to the institution. The undersigned in no way intends to diminish the serious public concerns raised by payment to an IRS Agent for any nefarious purpose, and realizes that the public well may question the total management of Cross County as a result of

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[22] There is no evidence that in Respondent's thirty years at the institution he ever offered a bribe to an examiner.

[23] Under post-FIRREA standards, "substantial" has been deleted and no qualifier precedes "loss."

Respondent's unrelated actions. However, under the more stringent standards of the pre-FIRREA statute, the undersigned does not find that the evidence presented supports a finding of current or future substantial loss or harm to the institution or the depositors.

At this point in the analysis on Count I, the undersigned has found that there has been a violation of a criminal law regarding the 1988 bribe to McLaughlin, but that the misconduct does not meet the degree of loss necessary under the statute. Without meeting the "effects" prong of the statute, Respondent cannot be removed or prohibited from further participation in the affairs of a federally insured financial institution. Nonetheless, the last prong, "culpability", is reviewed below.

3. Culpability

To support prohibition, the misconduct and its effect must also involve a specified degree of culpability, personal dishonesty or willful or continuing disregard for the safety or soundness of the institution. Continuing disregard can be established by showing a mental state akin to recklessness, whereas willful disregard requires proof of an awareness that the actions were detrimental the bank's safety and soundness.[24]

"Personal dishonesty" under the statute is intended to include among other things self-dealing and fraud. "[C]ommitting some king of fraud on the association or if the person is dipping into the till and lining his own pocket -- these are among the kinds of things that the section certainly is intended to reach."[25]

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[24] Brickner v. FDIC, 747 F.2d 1198, 1203 (8th Cir. 1984); In the Matter of Stoller, FDIC -90-115e, I FDIC Enforcement Decisions and Orders, ¶ 5174, p. A-1865 (Feb. 18, 1992).

[25] Institutions Supervisory Act of 1966; Hearings on s. 13158 Before the House Comm. on Banking and Currency, 89th Cong. 2d Sess. 55 (1966).

(Underlining added.)

The "culpability" portion of this three-tiered test, is the degree in which Respondent is accountable for jeopardizing the safety or soundness of the financial institution. In this instance, Respondent's payment of money to the IRS Agent in connection with grand jury subpoenas related neither to Cross County nor to specific personal activities at Cross County. While these actions demonstrate personal dishonesty, they do not evidence willful or continuing disregard for the safety or soundness of Cross County itself. Respondent was here dishonest and reckless but not in any manner associated with his official capacity at Bank. The undersigned reads this third prong of the statue as clearly intending the Respondent's actions to relate to the financial institution directly, and not merely indirectly or in some peripheral manner. Accordingly, the evidence presented is insufficient to support a finding that Respondent should be removed or prohibited under Count I in the Notice since the "effects" and "culpability" requirements of the statue have not been met.

C. COUNT II

1. Misconduct: Violation of Law, Unsafe or Unsound Practice and Breach of Fiduciary Duty

In Count II of the Notice, Respondent is charged with disclosing confidential bank information to McLaughlin as part of a scheme to cause bank customers to offer a bribe in order to avoid a tax investigation. Respondent's misconduct is, first, a violation of law, second, an unsafe or unsound banking practice, and third, a breach of fiduciary duty.

a. Violation of Law

Respondent aided and abetted a bribe in violation of 18 U.S.C. §2, which provides in pertinent part that:

> Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures commission, is punishable as a principal.

The offense is proven by the showing that Respondent "associate[d] himself with the venture ...participate[d] in it as something that he wishe[d] to bring about," and sought "by his action to make it succeed."[26]

In late April 1988, McLaughlin met Respondent at Cross County at Respondent's request, and proceeded to a restaurant for lunch. (TR. 109-110; OTS Exh. 6 at 6) Respondent suggested to McLaughlin[27] that McLaughlin open an investigation of bank customers, unnamed at that time, for tax evasion, upon which Respondent would arrange for the customers to bribe McLaughlin to terminate the case. Respondent clearly stated that the bribe money would be strictly for McLaughlin, and not for himself (OTS Exh. 6 pp. 6, 24), though as hereinafter discussed he later suggested payment of a portion of the bribe to an intermediary.

The transcript of the conversation reveals the two men arranging details. McLaughlin told Respondent that he needed a note or letter listing the charges against the customers so that he could legitimately initiate a case. (TR. 115) Respondent

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[26] United States v. Mayo, 705 F.2d 62, 72 (2d Cir. 1983). See also, United States v. Stolfi, 889 F.2d 378, 381 (2d Cir. 1989); United States v. Dixon, 658 F.2d 181, 189 n. 17 (3d Cir. 1981).

[27] Respondent's proposition is clearly made on his own volition, without any prompting from McLaughlin. The transcript of the taped conversation shows that the men were talking about another matter when Respondent changed the subject and launched into his proposal. (OTS Ex. 6, pp. 4-6).

offered his friend and fellow board member, Max Fodera ("Fodera"), as an intermediary with the bank customers. (TR. 114; OTS Exh. 6 at 11).

On May 11, 1988, the two men met again at Cross County. Respondent initially appeared hesitant to pursue the matter, and told McLaughlin that he would think about it. (OTS Exh. 7 at 3). During their conversation, McLaughlin told Respondent that if he wanted this couple to be investigated he needed to know their names, social security numbers, business addresses, tax returns, and a description of the charges to be alleged. (OTS Exh. 7 at 3). The customers, Mr. and Mrs. Parlante, had obtained a mortgage from Cross County on their personal residences through Respondent (TR. 375-76, 412-13), and Respondent then disclosed to McLaughlin without prior consent (TR. 379 413-4), the Parlantes' social security numbers, their home and business addresses, their business interests, and their income as taken from their mortgage application. (TR. 117; OTS Exh. No. 7 at 8). Respondent told McLaughlin that he should expect to receive $25,000 from the Parlantes, and asked that Fodera be given $2,500 for helping to arrange the bribe as a finder's fee in identifying the Parlantes (TR. 129).

In August of 1988, pursuant to a pre-arranged agreement between the two men, McLaughlin served a grand jury subpoena on Cross County for the Parlantes' bank records. (TR. 128.) The Parlantes were notified, Fodera met with them at their place of business to discuss the subpoena, and about a week later Mrs. Parlante met with Respondent at the Bank. Respondent told Mrs. Parlante that McLaughlin accepted bribes and that she should offer him a bribe. (TR. 382) Mrs. Parlante, however, directed Respondent to disclose the requested information in accordance with the subpoena. Respondent thereafter dealt only with her husband ("Parlante").

Respondent coached the principal players in the art of offering and accepting a bribe. He met with Parlante and told him that he had bribed McLaughlin the year before to make a problem "go away," and that Parlante, whether or not guilty of

anything, should do the same. (TR. 417) Respondent arranged a code phrase, "May I call you Kevin," which Parlante would use to indicate that they should discuss a bribe. (TR. 417). Respondent also instructed Parlante to write particulars down rather than stating them aloud, and instructed him to pay the agent $25,000. (TR. 418) Parlante testified that Respondent told him that the bribe was really like buying insurance and would save him money in not having to pay an attorney. (TR. 418)

Respondent also instructed McLaughlin in much the same manner as he did Parlante. Respondent told McLaughlin what he had discussed at the meeting with Parlante, and also told McLaughlin that if he wrote anything down he should not throw it away but should take it with him upon leaving the meeting, that he should be careful with what he said, and that he should get the money from Parlante at that meeting. (TR. 148).

On October 20, 1988, McLaughlin met with Parlante at Parlante's place of business. After Parlante engaged in some extemporaneous attempts to negotiate, the dual arias were jointly sung a cappella, as orchestrated, and Parlante gave McLaughlin $20,000 at that meeting and the remaining $5,000 one week later, of which McLaughlin later gave Fedora $2,500.

The record is completely clear that Respondent participated in and brought about the bribe offered to McLaughlin by Parlante. It is also clear by his coaching efforts that he wanted the action to succeed. After the parties were arrested, Parlante pled guilty to bribing an official and Fodera pled guilty to aiding and abetting that bribery. The undersigned here determined that Respondent aided and abetted the offense against the United States in violation of 18 U.S.C. §2.

b. Unsafe and Unsound Practice

"Unsafe and unsound" is a broad-based concept overearching the entire spectrum of banking operations. The phrase is not defined in the Federal Deposit Insurance Act, which also does not specify practices which are unsafe or

unsound. Although not explained or clarified in the applicable statute, the phrase has been commonly understood to mean the following:

> ... [T]he term "unsafe or unsound practices" has a central meaning which can and must be applied to constantly changing factual circumstances. Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance fund.

Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Committee on Banking and Currency, 89th Congress, 2nd Sess., at 49-50 (1966).

Of the many decisions noting the above, that most frequently cited is First National Bank of Eden v. Department of the Treasury, 568 F.2d 610, 611 (8th Cir. 1978).

Respondent misused his official position at Cross County to obtain confidential information in order to arrange and facilitate a bribery scheme. In order to arrange a bribe Respondent obtained and disclosed to McLaughlin confidential information from Bank files on the Parlantes in violation of the Right To Financial Privacy Act, 12 U.S.C. §3401 et. seq. ("REPA").[28] The disclosure was not made pursuant to any type

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[28] Respondent's argument that he was appropriately disclosing information relating to the possible commission of a crime to law enforcement authorities is so unwarranted as to be bizarre. Respondent did not follow the procedures for releasing information regarding criminal conduct (Tr. 655, 657-58), and it is completely indisputable from the testimony and the transcripts of tapes that Respondent's intent was to always to arrange a bribe and not to legitimately reveal customers possibly guilty of tax evasion.

of subpoena or search warrant. Respondent acted recklessly and irresponsibly and clearly in contradiction to generally accepted standards of prudent banking operation.

c. Breach of Fiduciary Duty

Acting in a fiduciary capacity, Respondent had a duty to make a full and fair disclosure of material facts to any person placing confidence in him.[29] It has been ruled[30] that:

> In general corporate matters, the Supreme Court has held, when directors and officers and directors place their personal interests above those of the corporation or utilize corporate resources for personal gain, they have committed a serious breach of their common law fiduciary duty.
> ... The standards are even higher in banking, where the officers and directors are charged with looking after other people's money. Indeed, given the paramount importance of a credible and safe and sound banking system, there can be no question that officers and directors of banks are held to the very highest standards of fiduciary duty.

The evidence presented amply supports that Respondent breached his fiduciary duty. Respondent misused his official

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[29] RTC v. Holland & Knight, 832 F.Supp. 1528, 1529 (1993).

[30] In the Matter of Stoller, FDIC 90-115e, I Prentice-Hall FDIC Enforcement Decisions, ¶5174, page A-1865, February 18, 1992, affirming Recommended Decision, Judge Rose, page A-1880.

position at Cross County to obtain and disclose confidential information on bank customers for the purpose of arranging a bribe. Respondent's reasons for in engaging in this activity are not clear from the record, but there is no doubt that he placed his own interests above those of the institution. For all the reasons above, Respondent's misconduct includes a violation of law, unsafe or unsound practice, and a breach of fiduciary duty.

2. Effects

Unlike the facts presented in Count I, the disclosure and misuse of confidential bank information is integrally related to Respondent and his position at Cross County. In the circumstances of Count II, Assistant Director Simone's predictive testimony that as a result of Respondent's misconduct Cross County has suffered or will probably suffer substantial financial loss or other damage or harm to the interests of its savings account holders, has a valid basis of support in logic. The undersigned can have no doubt that news of a director and officer disclosing a customer's confidential bank information in order to arrange for blackmail or to inveigle a bribe, would send serious warning to others that it would not be wise to do business with that bank. In this instances, as Assistant Simone testified, an exodus of bank customers to another institution was well as a reduction in new customers willing to do business with the bank, causing substantial financial loss or other damage to Cross County, would be warranted and expected.

3. Culpability

The record supports a finding that Respondent acted with personal dishonesty. Personal dishonesty includes a disposition to lie, cheat, or defraud; untrustworthiness; lack of integrity; misrepresentation of facts and deliberate deception by pretense and stealth; or want of fairness and straightforwardness.[31] The

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[31] Van Dyke v. Bd. of Gov. of Federal Reserve System, 876 F.2d 1377, 1379 (8th Cir. 1989).

record also clearly demonstrates that Respondent's conduct throughout the entire Parlante episode were related to the Bank, were intentional, and that his misuse of his position occurred over period time. Therefore, the evidence also supports a finding of willful and continuing disregard for the safety and soundness of Cross County. The "misconduct", "effects", and "culpability" requirements, and even the alternative requirements within each, have been established by a preponderance of the evidence as to Count II.

IV. CONCLUSION OF LAW

1. The Director of the OTS has the authority to issue a Notice of Intention to Remove and Prohibit and Notice of Hearing pursuant to section 5(d)(1)(A) of the HOLA, as amended, 12 U.S.C. §1464(d)(1)(A), and Section 8(e) of the FDIA, 12 U.S.C. §1818(e).

2. At all times relevant to the events set forth herein, Respondent was a director and officer within the meaning of 12 U.S.C. §1464(d)(4)(A).

3. It has not been proven that Respondent has violated the provision of the pre-FIRREA removal and prohibition statute, 12 U.S.C. §1464(d)(4)(A), with respect to Count I of the Notice, in that while there is sufficient proof of the misconduct, there is insufficient proof of required effect or of Respondent's culpability within the terms of that provision.

4. Respondent has violated the provisions of the pre-FIRREA removal and prohibition statute under 12 U.S.C. §1464(d)(4)(A) with respect to Count II in the Notice based upon the following findings:

(a) Respondent violated 18 U.S.C. §2 by aiding, abetting and counseling commission the crime of bribery, through his inducting or procuring the bribery of a public official; and

(b) by reason of such violations of law, Cross County has suffered or will suffer substantial financial loss or other damage; and

(c) such violations involve Respondent's personal dishonesty and demonstrate his willful and continuing disregard for the safety and soundness of Cross County.

5. Respondent has violated the provision of 12 U.S.C. §1464(d)(4)(A) with respect to Count II based upon the following findings:

(a) Respondent engaged in unsafe and unsound practices and breached his fiduciary duty in connection with Cross County; and

(b) by reason of such practice and breach, Cross County has suffered or will suffer substantial financial loss or other damage; and

(c) such practice and breach involves Respondent's personal dishonesty, and demonstrates his willful and continuing disregard for the safety and soundness of Cross County.

V. RECOMMENDED DECISION

For all the reasons above, the undersigned recommends that Respondent be removed and prohibited form further participation in the affairs of federally insured financial institutions pursuant to 12 U.S.C. §1464(d)(4)(A). The attached Proposed Order is submitted herewith and made a part hereof.

/s/
Walter J. Alprin
Administrative Law Judge
Office of Financial Institution Adjudication

PROPOSED ORDER

UNITED STATES OF AMERICA
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

IN THE MATTER OF

MICHAEL COUSIN, a Person Participating in the Conduct of the Affairs Bank, MIDDLE VILLAGE, QUEENS, NEW YORK

Docket No. OTS-AP-93-38

ORDER OF PROHIBITION

WHEREAS, pursuant section 8(e) of the Federal Deposit Insurance Act, as amended, (the "Act") (12 U.S.C. §1818(e)), the Office of Thrift Supervision of the United States Department of the Treasury is of the opinion, for the reasons set forth in the accompanying Final Decision, that a final order of Removal and Prohibition should issue against MICHAEL COUSIN,

NOW, THEREFORE, IT IS HEREBY ORDERED, pursuant to sections 8(e) and 8(j) of the Act (12 U.S.C. §§1818(e) and 1818(j)), that:

1. In the absence of prior written approval by the Board, and by any other Federal financial institution regulatory agency where necessary pursuant to said statutes, MICHAEL COUSIN is hereby permanently removed from office and prohibited:

(a) from participating in the conduct of the affairs of any bank holding company, any insured depository institution, or any other institution specified in said statutes;

(b) from soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in said statutes;

(c) from violating any voting agreement previously approved by the appropriate Federal banking agency; or

(d) from voting for a director, or from serving or acting as an institution-affiliated party as defined in section 3(u) of the Act (12 U.S.C. §1813(u)), including serving as an officer, director, or employee.

2. This Order, and each provision hereof, is and shall remain fully effective and enforceable until expressly stayed, modified, terminated or suspended in writing by the Board.

3. This Order shall become effective upon the expiration of thirty days after service is made.

By Order of the Office of Thrifty Supervision, this day of , 1994.

By: _____
Jonathan L. Fichter
Acting Director
The Office of Thrift Supervision

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

- against -

MICHAEL COUSIN, 90 CR 745 (EHM)

Defendant.
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MEMORANDUM AND ORDER

NICKERSON, District Judge:

Plaintiff brought this action under the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, seeking a declaration that a suspension order issued by defendant Office of Thrift Supervision (the defendant), suspending plaintiff from engaging in certain banking activities is no longer in effect.

The court has jurisdiction based on Federal questions, pursuant to 28 U.S.C. §1331, as the complaint alleges violations of the Fifth Amendment of the United States Constitution and 12 U.S.C. §1818(g), providing procedures for certain administrative suspensions from banking activities. The defendant has moved to dismiss the complaint, and plaintiff has cross-moved for summary judgment.

The papers submitted by the parties and the file in the case of United States v. Cousin, CR 90-745 (EHN), show, in substance, the following.

For some years plaintiff was Chairman of the Board of Directors and Chief Executive Officer of Cross County Federal Savings Bank (the Bank). On August 8, 1990 the United

States charged plaintiff in a criminal complaint with bribery, in violation of 18 U.S.C. § 201. Based on the charges, the defendant issued a notice of suspension from participating in the Bank's affairs pursuant to 12 U.S.C. § 1818(g)(1). That section gives the defendant the power to suspend a bank official based on pending charges until the charges are "finally disposed of or until [the suspension is] terminated by the agency."

On September 9, 1990 a grand jury indicted plaintiff in eight counts, six charging that on six occasions between May 27, 1987 and December 19, 1989 plaintiff paid bribes to a special agent of the Internal Revenue Service. The two other counts charged plaintiff (a) with conspiring to induce a special agent of the Internal Revenue Service to receive a bribe so that he would investigate other people and (b) with aiding and abetting a bribe of a special agent of the Internal Revenue Service.

Plaintiff then requested a hearing to challenge his notice of suspension, pursuant to 12 U.S.C. § 1818(g)(3). He had an informal administrative hearing on March 1, 1991. The presiding officer recommended that the defendant keep the suspension in force, and on July 12, 1991 the Director of defendant adopted that recommendation. The Director's order stated that the "suspension and prohibition shall continue in effect until the final disposition of the indictment [sic] upon which the Notice was based."

Plaintiff retained an able and experienced lawyer, James M. LaRossa, to represent him in the criminal case. Mr. LaRossa urged the court that plaintiff was mentally incompetent to stand trial.

The court held a hearing on that issue. Defense counsel called a psychiatrist, who testified that plaintiff was not in a position to consult with his lawyers wit a reasonable degree of rational understanding, that he would not be able to
listen to the suggestions his attorney might have, and that he would not even be able to listen to the four years worth of tape recordings of himself or read the transcripts of those recordings.

Michael S. Ross, a partner of Mr. LaRossa, also testified for plaintiff at the hearing. Mr. Ross said that plaintiff talked about suicide "all the time," said the charges in the indictment were "meaningless," but at the same time refused to help his attorneys or even discuss the case with them.

The psychiatrist for the government, Naomi Goldstein, testified that although plaintiff had the capacity to deal with the criminal charges he had very successfully avoided dealing with them and would rather sit by passively and not put on a defense than actively participate in a trial that might end in a conviction.

After the hearing Mr. LaRossa made a submission saying that plaintiff was not physically capable or mentally competent to stand trial. The court then held a status conference on April 17, 1992. Mr. LaRossa reported that plaintiff was not getting better, indeed that he had developed serious diabetes and his mental condition was worse, although he wanted "an immediate trial so that he can proclaim his innocence."

The Assistant United States Attorney, Jodi Avergun, suggested that plaintiff's physical problems be addressed because if he were found mentally incompetent the court would have to detain him for examination, which she thought "would be at a great detriment to his physical health."

Thereafter, on May 6, 1992 plaintiff moved to dismiss the indictment, and on May 25, 1992 the court entered an order dismissing the indictment. That order said:

The defendant MICHAEL COUSIN having appeared in open Court on May 6, 1992 and having moved orally to dismiss the above-captioned indictment on the grounds that he is not physically compete to stand trial, AND

The United States Attorney for the Eastern District of New York, by Assistant United States Attorney Jonathan M. Gerson, having reviewed medical evaluations of the defendant's physical condition, not having opposed the said motion, AND

The said motion having been granted, AND

The Court having received correspondence dated May 15, 1992 from Angelo Vigni, Regional Director of the Office of Thrift Supervision, requesting that the Order of Dismissal in this case include language stating that the dismissal "does not constitute [a] final disposition of the indictment for the purposes of 12 U.S.C. § 1818(g), and is not a dismissal on the merits", AND

The Court having further received correspondence dated May 19, 1992 from Michael S. Ross, Esq., counsel to the defendant, stating that he "would not object to language in the dismissal order in effect stating that the dismissal does not constitute a final disposition of the indictment for purposes of 12 U.S.C. § 1818(g); is not a dismissal on the merits; and is a dismissal based solely upon Mr. Cousin's physical condition."

IT IS ORDERED that the indictment is dismissed against the defendant MICHAEL COUSIN. This dismissal does not constitute a final disposition of the indictment for the purpose of 12 U.S.C. § 1818(g), is not a dismissal on the merits, and is a dismissal based solely upon the physical condition of the defendant MICHAEL COUSIN. (Emphasis supplied).

Thereafter plaintiff retained his present attorney who filed the complaint on February 5, 1993 and an amended complaint on February 11, 1993, seeking a judgment that the dismissal of the indictment in fact amounted to a "final disposition" of the charges against plaintiff ad therefore the suspension was no longer in effect. Defendant has moved to dismiss, and plaintiff has cross-moved for summary judgment.

II

As noted above, prior to the entry of the May 25, 1992 order plaintiff's then counsel argued that he could not stand trial because he was physically and mentally incompetent, and adduced testimony of, among other things, severe stress-related physical

disorders, arguably fatal should he stand trial, and of a five-year deterioration in plaintiff's ability to function psychologically, culminating in depression and an unwillingness to cooperate with counsel.

The United States Attorney showed great understanding and patience in dealing with plaintiff and his then attorneys, and the dismissal "solely upon the physical condition" spared plaintiff the embarrassing experience of being sent to a hospital for psychiatric examination to determine his mental fitness to stand trial. Plaintiff's then attorneys convinced the court that plaintiff was a shell of the man he once was, and it appeared that he was unable to continue in his former activities.

Defendant was concerned that plaintiff might use the dismissal of criminal charges as n occasion to return to the bank. Defendant thus sought, with the concurrence of the United States Attorney, the emphasized language in the May 25, 1992 order.

At oral argument on these motions the Assistant United States Attorney informed the court that the statute of limitations may now have run on all but one of the eight counts (involving a $200 Christmas gift to an Internal Revenue Service agent) in the indictment.

III

The pertinent statutory section, 12 U.S.C. §1818(g)(1) provides, so far as relevant:

(A) In General

Whenever any institution-affiliated party is charged in any...indictment with the commission of or participation in -

(i) a crime involving dishonesty or breach of trust...
the appropriate Federal banking agency may, if continued service or participation by such party

> may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution..., suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution.

(B)(ii) Effective Period

> A suspension or prohibition under subparagraph (A) shall remain in effect until the... indictment is finally disposed of or until terminated by the agency.

The May 25, 1992 order referred to than section and the effective period for suspensions under it. Plaintiff's now attorney argues that the court should not give the language in the order its plain meaning that it was not "a final disposition of the indictment for the purposes of 12 U.S.C. § 1818(g)." He also contends that continued suspension deprives plaintiff of his Fifth Amendment rights to liberty and property without due process of law.

IV

Finally, this court's holding as to the meaning and effect of the consensual language in the May 25, 1992 order does not, as plaintiff's attorney suggests, extend this court's subject matter jurisdiction beyond its limits. The court is simply interpreting language agreed to between plaintiff, through counsel, and the government. Plaintiff's attorney attempts to buttress this argument by indirect claims that the court compelled plaintiff to accept this language. This is not so. Plaintiff could readily have chosen to go to trial in his criminal case, and this court was prepared to try the case.

V

Defendants' motion to dismiss is granted. Plaintiff's cross-motion for summary judgment is denied.

So Ordered.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STAMPED FILED
May 28 1992

----------x

UNITED STATES OF AMERICA

- against -

MICHAEL COUSIN,

Defendant.

----------x

ORDER OF DISMISSAL
90 CR 745 (EHM)

The defendant MICHAEL COUSIN having appeared in open Court on May 6, 1992 and having moved orally to dismiss the above-captioned indictment on the grounds that he is not physically competent to stand trial, AND

The United States Attorney for the Eastern District of New York, by Assistant United States Attorney Jonathan M. Gerson, having reviewed medical evaluations of the defendant's physical condition not having opposed the said motion, AND

The said motion having been granted, AND

The Court having received correspondence dated May 15, 1992 from Angelo Vigni, Regional Director of the Office of Thrift Supervision, requesting that the Order of Dismissal in this case include language stating that the dismissal "does not constitute [a] final disposition of the indictment for purposes of 12 U.S.C. §1818(g) and is not a dismissal on the merits", AND

The Court having further received correspondence dated May 19, 1992 from Michael S. Ross, Esq., counsel to the defendant, stating that he "would not object to language in the dismissal order in effect stating that the dismissal does not constitute a final disposition of the indictment for purposes of 12 U.S.C. §1818(g); is not a dismissal on the merits; and is a dismissal based solely upon Mr. Cousin's physical condition",

IT IS ORDERED that the indictment is dismissed against the defendant MICHAEL COUSIN. This dismissal does not constitute a final disposition of the indictment for purposes of 12 U.S.C. §1818(g), is not a dismissal on the merits, and is a dismissal based solely upon the physical condition of the defendant MICHAEL COUSIN.

/s/

EUGENE H. NICKERSON

Dated: Brooklyn, New York
May 25, 1992

Michael Cousin
84-52 63rd Avenue
Middle Village, NY 11379

December 13, 1993

Hon. Eugene H. Nickerson
United States District Court Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

STAMPED FILED
Dec 30 1993

Re: Cousin v. Office of Thrift Supervision
CIV No. 93-0548 (EHN)

Dear Judge Nickerson:

My name is Michael Cousin. I've made several attempts to write to you about my case, but each time I sat down to write I hesitated. But now I feel that you should hear my side. I think that everyone has a right to express himself.

Your Honor, I was with Cross County Federal Savings Bank for more than 40 years. I never took advantage of Cross County and I never took the full salary to which I was entitled. I devoted all my time and energy to the success of Cross County, all to the detriment of my health and family. We became one of the highest ranking banks of our size in the country (see copy Sheshenoff letter and item from National Thrift News enclosed marked Exhibits "1" and "2" respectively).

When I was indicted, I immediately called Mr. Angelo Vigna who is the Regional Director of OTS for the Eastern District. I advised him that the problem I was having was not related to banking business. He said he was glad to hear that and he thanked me for calling him.

Prior to that telephone call, I hadn't had frequent communication of any kind with my supervisory agencies due to the fact that Cross County was a very successful bank and did

not require any supervision or disciplinary action of any kind. I am very proud to be in a position to make this statement.

After my telephone call to Mr. Vigna I was suspended. The next time his examiners were at the bank they questioned several employees about whether I was involved in the banking business of Cross County after my suspension. He even had then take affidavits from the employees attesting to that fact that I was not involved.

He has cause investigations to be had of anyone who has any relationship with me, including directors (two of whom have been friends of mine for over 40 years), relatives and personal friends. He has caused Cross County to expend hundreds of thousands of dollars in attorneys' fees, he has forced the resignations of good and loyal employees, he has disrupted the Board by forcing the resignations of Board members; all of which will eventually take its toll on the bank.

If he devoted half of his time and effort investigating the troubled banks in New York State, it would save the government and the taxpayers billions of dollars.

I believe that Mr. Vigna's action towards me is due to the fact that many years ago I was very close to Judge Louis B. Heller. Cross County was having a "book-entry" problem and Judge Heller helped me in Washington. Mr. Vigna, who, at that time, was employed by the Federal Home Loan Bank of New York, which was the supervisory agency for banks then, might have resented me when I went to Judge Heller for help.

Therefore, I feel that Mr. Vigna had no right to get involved by writing to you to keep me from returning to the bank after the matter was dismissed. (See copy of his letter to you dated May 15, 1992 marked as exhibit "3") He was not looking out for the good of Cross County, but he was looking to permanently remove me from the bank in order to exert further influence to select new Board members, which he did.

The IRS investigated me, for no reason, for more than four and a half years through its agent, Kevin McLaughlin (and others whom I never met). Now they admit that I was never even personally under investigation and they never thought they had any tax case against me. In all this time, including more than four years of wiretapping and bugging, they never found any evidence of any wrongdoing on my part, except for their wrongful claim regarding my gifts to Mr. McLaughlin years before the indictment.

In the more than four years of their investigation, I became very friendly with Kevin McLaughlin and I got to like him. I felt sorry for him; he was always complaining that the government didn't pay him enough for the work that he did. He was always expressing his concern about his need for money for his childrens' college education.

From time to time, and nearly always on Christmas, I gave him gifts and financial assistance. That was no bribe. He even asked me for a job at the bank and I told him I would gladly give him a job. He would call me several times a week and on many occasions said he felt like having Italian food and each of these occasions I took him to an Italian restaurant. He gained my confidence, then turned on me and had me arrested.

The government has always had to admit that nothing it claims I did was for personal gain or any other benefit. You may recall having expressed some question as to the insignificance of the charges yourself. I hope that this letter will help you to understand my position.

Your Honor, the biggest mistake I made in my case was engaging James LaRossa to represent me. Before I went to Mr. LaRossa, I went to see Thomas Puccio, a former Assistant United States Attorney. When Mr. Puccio looked at my indictment papers, he said, "This case will never go to trial". Instead of retaining Mr. Puccio, I took the advice of a friend of mine, went to see James LaRossa and engaged him to represent me.

Mr. LaRossa has been a friend of mine for over 25 years. Maybe I would have been better off going to a stranger. Mr. LaRossa did not represent me - he represented the government.

I told him and wrote him numerous times that the government had no case against me and that I wanted to go to trial. See copies of my letters dated June 17, 1991 and March 10, 1992, marked Exhibits "4" and "5" respectively. At one point, he wanted me to "cop a plea" but I refused since I was not guilty of any wrongdoing.

He sent me Dr. Peritz Levenson, who is a psychiatrist, without advising me in advance of the fact that this doctor is a psychiatrist. When I asked him why he sent me to a psychiatrist, he told me not to worry he knew what he was doing. Frankly, I didn't know or understand what he was doing but since he was my attorney I had no choice but to go along with him. Not having had any prior personal experience with criminal lawyers, I assumed he was doing the right thing for me. He always assured me that I would have no problem returning to the bank once the case was dismissed.

As I came to realize what he was doing I became very upset and wrote to him expressing myself (see Exhibit "5")

When Mr. LaRossa faxed me a copy of Mr. Vigna's letter to you (Exhibit "3"), I immediately replied to Mr. LaRossa by fax that I would not consent to a final order of prohibition (see my copy letter dated May 21, 1992 and marked Exhibit "6"). He said he understood. However, he assured me that the meaning of the rest of the language in Mr. Vigna's letter and subsequently, the language in your Order of
Dismissal dated may 25, 1992, enclosed and marked Exhibit "7", did not bar me from returning to the bank but only allowed OTS to initiate its own proceedings against me, if it wanted to.

When I first met Mr. Clark, I prayed every night that he would accept my case after James LaRossa misrepresented me. I met a lot of people in my life, but I know that I will never meet another person like Mr. Ramsey Clark. He has restored my

belief in mankind.

I have a serious health problem but it is not mental. I take medication (Cardizem CD, 180 mg. once a day) and I see my heart specialist regularly. It is very important that you understand and believe this, because it is true. However, my health problems are not serious enough to keep me from doing my job. The stress that I have been under for the past three and a half years far outweighs any stress that I would have in the course of any usual (or even unusual) business day.

I am 77 years of age and I know that I do not have too many good years left. I would very much like to have the opportunity to return to the bank, even if it is for a short stay, at this critical time in the bank's history before I am called to a "Higher Judge".

Your Honor, you can help me by indicating that your Order never intended to keep me from returning to the bank. I know that you are a just man and will understand and take into consideration the terrible injustice that was done to me.

Thank you for taking the time out of your busy schedule to read this rather lengthy letter.

Respectfully,

/s/
Michael Cousin

Encls.
cc: Jody Levine Avergun, Assistant US Attorney

Supreme Court, U.S.
FILED
JUN 24 1996

(2)

No. 95-1592

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL COUSIN, PETITIONER

v.

OFFICE OF THRIFT SUPERVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
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15 pp

QUESTION PRESENTED

Whether the court of appeals erred in affirming the order of the Acting Director of the Office of Thrift Supervision, under 12 U.S.C. 1464(d)(4)(A) (1982), prohibiting petitioner from participating further in the affairs of any federally insured depository institution.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1592

MICHAEL COUSIN, PETITIONER

v.

OFFICE OF THRIFT SUPERVISION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 73 F.3d 1242. The decision and order of the Acting Director of the Office of Thrift Supervision (Pet. App. A24-A71) and the recommended decision of the administrative law judge (Pet. App. A72-A104) are unreported. The memorandum and order of the district court dismissing petitioner's declaratory judgment action (Pet. App. A107-A113) is reported at 840 F. Supp. 8. The order of the district court dismissing the criminal indictment against petitioner (Pet. App. A114-A115) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1996. The petition for a writ of certiorari was filed on April 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the chairman and chief executive officer of Cross County Federal Savings Bank, Queens, New York (the Bank), a federally chartered and federally insured savings association regulated by the Office of Thrift Supervision (OTS). In late 1986, Special Agent Kevin McLaughlin, of the Internal Revenue Service (IRS) served a grand jury subpoena on European American Bank, requesting records relating to petitioner's account there. Petitioner was not a target or subject of the grand jury investigation. Pet. App. A5, A77.

Petitioner contacted McLaughlin in response to the subpoena. When they met, on May 27, 1987, petitioner offered to make a monetary contribution to a charity of McLaughlin's choice. Pet. App. A5. McLaughlin informed his superiors at the IRS of the offer, which he took to be an attempted bribe, and he was directed to engage thereafter in an undercover operation to determine if petitioner would follow through with the bribe. *Id.* at A5-A7. On June 9, 1987, in petitioner's office at the Bank, petitioner gave McLaughlin $1750 in cash and a Swiss silver bullion bar. *Id.* at A6, A34.

In early 1988, the IRS served a grand jury subpoena on All Queens Tudor Realty, an entity in which petitioner had a financial interest, as part of its investigation, to determine whether petitioner would engage in further bribery. Pet. App. A6. Petitioner

promptly contacted McLaughlin and, at a meeting at the Bank on February 10, 1988, offered to pay McLaughlin to quash the investigation. *Ibid.* On February 18, 1988, petitioner again invited McLaughlin to his office. There, petitioner gave McLaughlin an envelope containing $6500 in cash and told him that he did not "want to hear" anymore about the investigation. *Id.* at A35.

Shortly thereafter, on his own initiative, petitioner formulated a scheme through which McLaughlin could receive bribes from bank customers. Pet. App. A6. Petitioner said he would "give [McLaughlin] some information on some individuals, [so] that [McLaughlin] could open up a case, and then [petitioner] could arrange for [the individuals] to pay [McLaughlin] money to kill that case." *Ibid.* In furtherance of the scheme, petitioner acquired the Bank's mortgage files on Joan and John Parlante, whom petitioner believed were engaged in tax evasion, and then provided McLaughlin with confidential bank information about the Parlantes without their knowledge. *Ibid.* After a subpoena was served on the Bank for the Parlantes' records and the Parlantes were notified thereof, petitioner suggested to Mrs. Parlante that she could bribe the IRS agent (McLaughlin) into dropping the investigation. *Id.* at A7. Mrs. Parlante initially resisted the idea, but after a meeting with petitioner in which he instructed Mr. Parlante on how to bribe the agent, using Max Fodera (an associate of petitioner and a Bank director) as an intermediary, the Parlantes paid McLaughlin $25,000 to terminate the investigation. *Ibid.*

2. On August 8, 1990, petitioner was charged with multiple counts of bribery in the United States District Court for the Eastern District of New York.

Two days later, the OTS issued an order under 12 U.S.C. 1818(g)(1) temporarily suspending petitioner from his positions with the Bank and prohibiting him from participating in the Bank's affairs.[1] After an administrative hearing, the suspension order was continued pending final disposition of the criminal charges pending against petitioner. Pet. App. A3.

Petitioner's counsel sought to have the criminal charges against him dismissed on the grounds that he was neither physically nor mentally fit for trial. Pet. App. A3. After reviewing petitioner's medical evaluations, the Assistant U.S. Attorney did not object to dismissal on the ground that petitioner was not physically competent to stand trial. *Id.* at A114. The OTS, however, asked the court to make clear that the dismissal would not constitute a "final disposition" on the merits requiring discontinuation of the temporary order of suspension. *Ibid.* Petitioner's counsel advised the court that petitioner had no objection to the incorporation of language to that effect in the order of dismissal. *Ibid.* As entered, the order stated that "the dismissal d[id] not constitute a final disposition of the indictment for the purpose of 12 U.S.C. § 1818(g), is not a dismissal on the merits, and is a dismissal based solely upon [petitioner's] physical condition." *Id.* at A115.

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[1] Section 1818(g)(1) authorizes the OTS temporarily to suspend a thrift officer charged with a crime involving dishonesty or breach of trust punishable by a term of imprisonment exceeding one year if "continued * * * participation by such [officer] may pose a threat to the interests [of the depositors] or may threaten to impair public confidence in" the thrift. 12 U.S.C. 1818(g)(1)(A). The suspension remains in effect until the indictment "is finally disposed of," unless the suspension is terminated earlier by the OTS. 12 U.S.C. 1818(g)(1)(B).

3. Notwithstanding that express proviso, petitioner (apparently recovered from his health problems) returned to the district court on February 5, 1993, seeking a declaration that the dismissal of the indictment was a "final disposition" of the charges against him, and that his temporary suspension was therefore no longer in effect. Pet. App. A4, A110. The district court dismissed that suit, on the ground that petitioner had waived the right to argue that his temporary suspension expired upon the dismissal of the indictment. *Id.* at A112.

4. On May 13, 1993, the OTS instituted an enforcement proceeding against petitioner, under 12 U.S.C. 1464(d)(4)(A) (1982),[2] seeking an order permanently

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[2] The removal and prohibition statute is now codified at 12 U.S.C. 1818(e). Because the conduct at issue in this case occurred prior to the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), however, it is governed by 12 U.S.C. 1464(d)(4)(A) (1982), which authorizes the OTS permanently to bar a thrift officer from future participation in the affairs of any federally insured depository institution if it finds that the officer has

> [1] committed any violation of law, rule or regulation * * *, or has engaged or participated in any unsafe or unsound practice in connection with the association, or has committed or engaged in any act, omission, or practice which constitutes a breach of his fiduciary duty as such director or officer, and [2] the [OTS] determines that the association has suffered or will probably suffer substantial financial loss or other damage or that the interests of its savings account holders could be seriously prejudiced by reason of such violation or practice or breach of fiduciary duty, or that the director or officer has received financial gain by reason of such violation or practice or breach of fiduciary duty, and [3] that such violation or practice or breach of fiduciary duty is one involving personal dishonesty on the part of such director or officer, or a will-

barring petitioner from participating in the affairs of the Bank or of any other federally insured depository institution. The notice of charges asserted two separate counts of malfeasance warranting petitioner's removal and prohibition. Count I charged that, on two occasions in 1987 and 1988, petitioner bribed an IRS agent to terminate a grand jury investigation, in violation of 18 U.S.C. 201(b)(1)(C). Count II charged that petitioner aided and abetted the crime of bribery by disclosing confidential information concerning the Bank's customers to the same IRS agent and then orchestrating a bribe of the agent by the Bank's customers, in violation of 18 U.S.C. 2(a) and 201(b)(1)(C).

After a three-day hearing, the administrative law judge (ALJ) issued his recommended decision. See Pet. App. A72-A104. As to Count I, the ALJ found that petitioner engaged in bribery in 1988, thus satisfying the "misconduct" requirement of Section 1464(d)(4)(A), Pet. App. A88-A90,[3] but he concluded that the OTS's proof did not establish the "effects" and "culpability" required by the statute, *id.* at A92-

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ful or continuing disregard for the safety and soundness of the association.

Subparts [1], [2], and [3] are commonly referred to, respectively, as the provision's "misconduct," "effects," and "culpability" requirements. See Pet. App. A8.

[3] The ALJ rejected petitioner's assertion that he was entrapped into offering the 1988 bribe. Pet. App. A90-A92. The ALJ observed that it was petitioner who contacted McLaughlin in response to the subpoena on All Queens Tudor Realty, *id.* at A91, and who thereafter "initiated virtually all of the telephone calls and meetings with the agent," *id.* at A92. The ALJ also rejected petitioner's assertion of outrageous government misconduct in connection with the bribery investigation. *Ibid.*

A96. The ALJ found all three statutory requirements met with respect to Count II, however, and on that basis he recommended petitioner's permanent removal and prohibition. *Id.* at A96-A104. Both the OTS and petitioner filed exceptions to the recommended decision.

5. On October 11, 1994, after reviewing the record and the ALJ's recommended decision, the Acting Director of the OTS issued a final decision and order. Pet. App. A24-A71. He accepted the facts found by the ALJ, but also considered other facts of record. *Id.* at A33. In his view, the OTS had successfully established as to both counts all three requirements for permanent removal and prohibition. *Id.* at A43-A60. He concluded, with respect to Count I, (i) that petitioner engaged in "misconduct" by bribing McLaughlin, in violation of 18 U.S.C. 201(b)(1)(C), both in 1987 and in 1988 (Pet. App. A43-A47);[4] (ii) that the interests of the Bank's depositors "could be seriously prejudiced," because petitioner's unlawful conduct on the Bank's premises could result in a loss of public confidence in the Bank, possibly leading to a run on the Bank, and could in addition damage the Bank's credibility with its primary regulator (*id.* at A53-

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[4] The Acting Director concluded that petitioner's conduct also constituted the lesser included offense of offering illegal gratuities (18 U.S.C. 201(c)(1)(A)), which, unlike bribery, does not require proof of corrupt intent. Pet. App. A47-A49. The Acting Director found no support in the record for petitioner's assertion that he lacked predisposition and was induced by McLaughlin to commit the bribery and unlawful gratuity offenses, *id.* at A51-A53, and rejected petitioner's claims of outrageous government misconduct, *id.* at A53.

A59); and (iii) that petitioner's violations demonstrated "personal dishonesty" (*id.* at A59-A60).[5]

As to Count II, the Acting Director accepted the ALJ's findings that petitioner violated the law, engaged in unsafe and unsound practices, and breached his fiduciary duties to the Bank by revealing confidential customer information for the sake of aiding and abetting the bribery of an IRS agent, thereby meeting each of the alternative measures of "misconduct" permitted by Section 1464(d)(4)(A). Pet. App. A61-A66. He concluded further that petitioner's misconduct in revealing confidential customer bank records could seriously prejudice the interests of the Bank's depositors. *Id.* at A66. And, finally, he found that petitioner's conduct involved both personal dishonesty and a willful and continuing disregard for the safety and soundness of the Bank. *Id.* at A66-A67.

Based on those conclusions, the Acting Director issued an order removing petitioner from his positions at the Bank and permanently prohibiting him from participating in the affairs of any federally insured depository institution. Pet. App. A69-A71.

6. The court of appeals denied petitioner's petition for review. Pet. App. A1-A23. It held that the Acting Director's combined investigatory and adjudicative roles "f[e]ll well within the mandates of the Fifth Amendment," *id.* at A15-A17, and rejected peti-

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[5] The Acting Director rejected the ALJ's conclusion that "culpability" requires proof of misconduct *towards the institution*. He observed that while Section 1464(d)(4)(A) may be satisfied by a showing of willful or continuing disregard towards the institution, it also expressly permits proof of culpability through a demonstration of personal dishonesty. Pet. App. A60 & n.23.

tioner's claim that the Acting Director's order was not supported by substantial evidence.

The court found ample support for the Acting Director's conclusion that petitioner violated the law by aiding and abetting an illegal bribe. Pet. App. A17-A20.[6] The court agreed with the Acting Director that Section 1464(d)(4)(A)'s "misconduct" requirement may be satisfied by the violation of any law, whether banking-related or otherwise, Pet. App. A19-A20, and in the court's view the evidence showed that petitioner "conceived of a scheme in which he assisted a government official in the investigation of the potential financial improprieties of County Federal bank customers so that he might ultimately orchestrate the bribery of that government official," *id.* at A18.

The court also affirmed the Acting Director's ruling that the demonstration of the *possibility* of serious prejudice to the interests of the Bank's depositors was sufficient to meet the "effects" requirement of Section 1464(d)(4)(A). Pet. App. A20-A21. Although the court stated that the effect of petitioner's misconduct on the Bank's credibility with its primary regulator (the OTS) would not alone have amounted to serious prejudice, *id.* at A21, it found the record sufficient to support the Acting Director's conclusion, considering that petitioner's misconduct could also injure the depositors' confidence in the Bank. *Ibid.*

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[6] Because it concluded that the prohibition order was fully justified by the illegal actions charged under Count II, the court did not evaluate the Acting Director's findings with regard to Count I. Pet. App. A17.

Finally, the court found that aiding and abetting the bribery of an IRS agent demonstrated "a degree of culpability well beyond mere negligence," Pet. App. A22 (quoting *Kim* v. *OTS*, 40 F.3d 1050, 1054 (9th Cir. 1994)), and concluded, therefore, that the OTS had amply proved petitioner's "culpability" for purposes of Section 1464(d)(4)(A). Pet. App. A21-A22.

Having upheld the Acting Director's permanent order of removal and prohibition, the court of appeals dismissed as moot petitioner's declaratory judgment action challenging the continued effectiveness of the earlier temporary removal order. Pet. App. A23.

ARGUMENT

1. Contrary to petitioner's understanding (Pet. 11-13), the centralization of investigative and adjudicative functions within an agency is not violative of due process. *Winthrow* v. *Larkin*, 421 U.S. 35, 57-58 (1975). Here, Congress expressly authorized the Director of the OTS to issue initial charges and to make the ultimate adjudication of such charges. The Director is not involved in the prosecution of the charges. The constitutionality of that statutory scheme has been upheld by every court of appeals that has addressed the issue. See *Keating* v. *OTS*, 45 F.3d 322, 327-328 (9th Cir.), cert. denied, 116 S. Ct. 94 (1995); *Seidman* v. *OTS*, 37 F. 3d 911, 925-926 (3d Cir. 1994); see also *Simpson* v. *OTS*, 29 F.3d 1418, 1424 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995).

Petitioner's due process challenge (Pet. 14-20) to the Acting Director's discretionary authority to reject factual findings made by an ALJ is without support in the law. That challenge is, moreover, misplaced in this case, because here the Acting Director expressly accepted the facts relied on by the

ALJ. Pet. App. A33; see also *id.* at A11-A12. That the Acting Director also found certain additional record evidence relevant to his analysis (see *ibid.*) is constitutionally unexceptional.

2. Petitioner's statutory arguments are similarly without merit. Although petitioner asserts (Pet. 20-21) that the Acting Director erred in basing petitioner's removal and prohibition on conduct for which petitioner was not ultimately convicted, the plain language of the statute authorizes removal and prohibition upon proof, *inter alia*, that an officer "has committed" a violation of applicable law. 12 U.S.C. 1464(d)(4)(A) (1982). The statute does not require proof that the officer was prosecuted or convicted. Nor, contrary to petitioner's view (Pet. 22), does the statute require that the offense relate to banking. Rather, the "misconduct" requirement is satisfied by proof of "*any* violation of law, rule or regulation." 12 U.S.C. 1464(d)(4)(A) (emphasis added).[7] Similarly, the statute's culpability requirement does not call for proof that the officer's offense involved personal dishonesty relating directly to the banking institution (see Pet. 22), but may be met, as the court of appeals affirmed (Pet. App. A21-A22), by any offense demonstrating personal dishonesty. See 12 U.S.C. 1464(d)(4)(A).

3. Petitioner argues (Pet. 25-26) that the district court lacked jurisdiction to provide in its order dismissing the indictment against him that such dismissal was predicated on petitioner's poor health and

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[7] Although *Kim* v. *OTS*, *supra*, and *Brickner* v. *FDIC*, 747 F.2d 1198 (8th Cir. 1984), both involved charges of violations of banking laws, neither case held that only a violation of a banking-related law would satisfy the statutory requirement.

was not a final disposition of the criminal charges for purposes of Section 1818(g). Having sought a dismissal of the indictment on health grounds and having accepted the language in question when it was proposed, petitioner is not well placed—now that his health has improved and the statute of limitations has run on most if not all of the criminal charges against him—to contest it. In any event, the imposition of a permanent order of removal and prohibition superseded the earlier temporary suspension, 12 U.S.C. 1818(g)(1)(B)(ii), rendering moot any dispute respecting the continued effectiveness of the temporary suspension.

4. Petitioner's remaining arguments concern the Acting Director's findings of fact. The court of appeals correctly concluded that those findings were supported by substantial evidence. Pet. App. A23. Petitioner's contentions to the contrary relate to the particular facts of this case and do not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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